

# William & Mary Journal of Race, Gender, and Social Justice

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Volume 19 (2012-2013)  
Issue 3 *William & Mary Journal of Women and  
the Law*

Article 3

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May 2013

## A Child Needs a Champion: Guardian Ad Litem Representation for Prenatal Children

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A CHILD NEEDS A CHAMPION: GUARDIAN *AD LITEM*  
REPRESENTATION FOR PRENATAL CHILDREN

MARK H. BONNER & JENNIFER A. SHERIFF\*

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## INTRODUCTION

We often expect that parents care more about the well-being of their children than anyone else and that they will always do what is best for them. Unfortunately, there are instances in which parents harm their own children in terrible ways. When such harm does occur, the government must assume the role of child protector.

One of the primary means by which the government protects the interests of children is through the appointment of guardians *ad litem*. These individuals act as personal representatives for children by advocating for their best interests amid complex legal proceedings that often drastically impact the children's futures. Known also as "best friend,"<sup>1</sup> the guardian *ad litem* "lends voice to the best interests of the child so that the system will not fail to maintain a focus on the forest through the trees."<sup>2</sup>

But there is one group of children who rarely enjoy the protection of these guardians: prenatal children. This flaw in our judicial system

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1. Charles T. Cromley, Jr., Comment, "[A]s Guardian Ad Litem I'm in a Rather Difficult Position.," 24 OHIO N.U. L. REV. 567, 571 (1998) ("Originally the terms 'guardian [ad litem]' and 'best friend' held distinctive legal connotations under Ohio law. Both roles were as representatives of the child or another under legal incapacity. The distinction was in the purpose of the appointment and representation. The next friend was a representative for the purpose of prosecuting a claim on the behalf of the child, whereas the guardian [ad litem] was the representative for the purpose of defending the child from a claim. Today, however, the distinction has largely been abandoned and the separate legal significance of the terms lost in the blur.").

2. *Id.* at 567.

is due primarily to widespread ignorance of a prenatal child's need for legal protection along with an unwarranted fear of legal challenges in the aftermath of *Roe v. Wade*.<sup>3</sup> Only the state of Wisconsin<sup>4</sup> has specifically provided for the appointment of guardians *ad litem* for prenatal children.<sup>5</sup> This prevailing lack of legal representation leaves unborn children vulnerable, not only to the irreparable harm that their own mothers may inflict upon them, but also to the dangers posed by illegal abortion and infanticide as was so egregiously practiced in the case of Dr. Kermit Gosnell in his "House of Horrors" scandal.<sup>6</sup>

This article examines the case for appointing guardians *ad litem* for prenatal children in all cases involving substantiated allegations of maternal substance abuse or whenever a concerned person discovers that a pregnant woman intends to obtain an illegal abortion. To this end, the article is divided into five major parts.

Part I introduces the current role of guardians *ad litem* in the United States and various foreign jurisdictions, including a discussion of how they are appointed and for what purpose. Additionally, this section examines the rights of prenatal children under international law.

Part II investigates the legal protections already afforded to prenatal children, which include the right to receive medical treatment against their mothers' wishes, as well as various civil and criminal penalties against persons who harm or kill prenatal children.

Part III assesses the propriety and necessity of appointing guardians *ad litem* for prenatal children and explains why legal representation is vital to their protection. At the outset, this section will scrutinize the Kermit Gosnell "House of Horrors" scandal in which a clinical physician illegally aborted numerous viable prenatal children and committed countless acts of infanticide.<sup>7</sup> For over a decade, these atrocities went unchecked, unrestrained, and unregulated by the very agencies that should have intervened years before his illegal practices were exposed.<sup>8</sup> Additionally, this section examines some of the most common arguments against appointing guardians *ad litem* for prenatal children and articulates why such arguments are unpersuasive. Finally, this section explores how prenatal children are

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3. 410 U.S. 113 (1973).

4. WIS. STAT. ANN. § 48.235(1)(f) (West 2012).

5. The terms "prenatal child," "prenatal baby," and "unborn child" used throughout this article are all synonyms for "fetus." The term "fetus" is considered to be "offensive, dehumanizing, prejudicial, [and] manipulative" and has been termed an "F-word." Terrence McKeegan, *Heavyweight Philosophers Clash at Abortion Conference*, C-FAM (Oct. 21, 2010), <http://www.c-fam.org/fridayfax/volume-13/heavyweight-philosophers-clash-at-abortion-conference.html> (quoting John Finnis, professor emeritus at Oxford University).

6. See *infra* Part III.A.

7. See *infra* Part III.A.

8. See *infra* Part III.A.

acutely susceptible to abuse and neglect and argues that *Roe v. Wade*, although applicable to legal abortions, is irrelevant in child protective proceedings since guardians *ad litem* are already being appointed to represent prenatal children in a wide variety of other legal contexts.<sup>9</sup>

Part IV outlines existing child welfare legislation, found only in the state of Wisconsin, which specifically provides guardian *ad litem* representation for prenatal children if and when their mothers abuse alcohol or drugs during pregnancy. This significant statute permits the government to take pregnant women into custody for the sole purpose of protecting the health of their unborn children.<sup>10</sup>

Part V, the final section of this article, proposes some legislative solutions and a model statute which will effectively expand existing child welfare legislation to include guardian *ad litem* representation for prenatal children in all cases involving substantiated allegations of maternal substance abuse and planned illegal abortion. When pregnant women are unwilling or unable to properly care for their own, these unborn children both need and deserve legal representation. Who better than a guardian *ad litem* to vigorously champion their cause?

## I. THE ROLE OF GUARDIANS *AD LITEM* IN THE UNITED STATES AND FOREIGN JURISDICTIONS

### *A. The Role of Guardians Ad Litem in the United States*

Every state, the District of Columbia, Guam, and the Virgin Islands currently have statutes providing guardian *ad litem* representation for children who have already been born.<sup>11</sup> In federal

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9. See *infra* Part III.G.

10. See *infra* Part IV.

11. See ALA. CODE § 26-14-11 (2012); ALASKA STAT. ANN. § 25.23.125(b) (West 2012); ARIZ. JUV. CT. R. P. 70(A); ARK. CODE ANN. § 9-27-316(f) (West 2012); CAL. WELF. & INST. CODE § 326.5 (West 2012); COLO. REV. STAT. ANN. § 19-3-203(1) (West 2012); CONN. GEN. STAT. ANN. § 46b-129a(2)(B) (West 2012); DEL. CODE ANN. tit. 29, § 9007A(b) (West 2012); D.C. CODE § 16-316(b) (2012); FLA. STAT. ANN. § 39.807(2)(a) (West 2012); GA. CODE ANN. § 15-11-98(a) (West 2012); 19 GUAM CODE ANN. § 13308 (2012); HAW. REV. STAT. § 587A-16 (West 2012); IDAHO CODE ANN. § 16-1614 (West 2012); 705 ILL. COMP. STAT. ANN. 405/2-17.1 (West 2012); IND. CODE ANN. § 31-15-6-1 (West 2012); IOWA CODE ANN. § 633A.6306 (West 2012); KAN. STAT. ANN. § 38-2205(a) (West 2012); KY. REV. STAT. ANN. § 620.100(1)(d) (West 2012); LA. CHILD. CODE ANN. art. 607(A) (2012); ME. REV. STAT. ANN. tit. 4, § 1501 (2011); MD. R. FAM. LAW § 9-205.1; MASS. GEN. LAWS ANN. ch. 215, § 56A (West 2012); MICH. COMP. LAWS ANN. § 722.630 (West 2012); MINN. STAT. ANN. § 260C.163(5) (West 2012); MISS. CODE ANN. § 93-17-8(1)(b) (West 2012); MO. ANN. STAT. § 210.160 (West 2012); MONT. CODE ANN. § 40-4-205 (West 2011); NEB. REV. STAT. ANN. § 42-358(1) (West 2012); NEV. REV. STAT. ANN. § 128.100(1) (West 2011); N.H. REV. STAT. ANN. § 169-C:10 (2013); N.J. STAT. ANN. § 2A:4A-92 (West 2013); N.M. STAT. ANN. § 32A-1-7

cases, courts “may appoint, and provide reasonable compensation and payment of expenses for, a guardian [*ad litem*] for a child who was a victim of, or a witness to, a crime involving abuse or exploitation to protect the best interests of the child.”<sup>12</sup> In addition, our federal government has passed legislation apportioning federal funds to the states for the specific purpose of improving and funding state child protective services agencies.<sup>13</sup> One of the primary objectives discussed in this federal legislation is “improving legal preparation and representation, including—(i) procedures for appealing and responding to appeals of substantiated reports of abuse and neglect; and (ii) provisions for the appointment of an individual appointed to represent a child in judicial proceedings.”<sup>14</sup> In most states, these individuals are called guardians *ad litem*; however, a handful of jurisdictions refer to them as court-appointed special advocates or something else.<sup>15</sup> In Maryland, for example, these appointed individuals are referred to as “Child’s Best Interest Attorney[s].”<sup>16</sup> In thirty-three states, a guardian *ad litem* is, or can be, an attorney.<sup>17</sup> Guardians *ad litem*

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(West 2012); N.Y. FAM. CT. ACT § 1016 (McKinney 2012); N.C. GEN. STAT. ANN. § 7B-601 (West 2012); N.D. CENT. CODE ANN. § 50-25.1-08 (West 2011); OHIO REV. CODE ANN. § 2151.281 (West 2011); OKLA. STAT. ANN. tit. 10A, § 1-4-102(c) (West 2012); OR. REV. STAT. ANN. § 419B.231 (West 2012); 23 PA. CONS. STAT. ANN. § 2741(b) (West 2012); R.I. GEN. LAWS ANN. § 40-11-14 (West 2012); S.C. CODE ANN. § 63-9-720 (2012); S.D. CODIFIED LAWS § 26-8A-18 (2012); TENN. CODE ANN. § 37-1-149(a)(1) (West 2012); TEX. FAM. CODE ANN. § 51.11 (West 2011); UTAH CODE ANN. § 78A-6-902(1) (West 2012); VT. STAT. ANN. tit. 33, § 5112 (West 2012); VA. CODE ANN. § 16.1-266 (West 2012); V.I. CODE ANN. tit. 5, § 2542 2012; WASH. REV. CODE ANN. § 26.44.053(1) (West 2012); W. VA. CODE ANN. § 48-9-302 (West 2012); WIS. STAT. ANN. § 54.40(1) (West 2011); WYO. STAT. ANN. § 14-3-211 (West 2012).

12. 18 U.S.C. § 3509(h)(1) (2006).

13. 42 U.S.C. § 5106a(a) (2006).

14. *Id.* § 5106a(a)(2)(B)(i)–(ii).

15. *See, e.g.*, ARK. CODE ANN. § 9-27-316(f) (West 2012) (attorney *ad litem*); KY. REV. STAT. ANN. § 620.100(1)(d) (West 2012) (“court-appointed special advocate”); LA. CHILD. CODE ANN. art. 607(A) (2012) (“independent counsel”); N.J. STAT. ANN. § 2A:4A-92 (West 2013) (“Court Appointed Special Advocate”).

16. MD. R. FAM. LAW 9-205.1(c)(1)(A).

17. ALA. CODE § 26-14-11 (2012); ALASKA STAT. ANN. § 25.23.125(b) (West 2012); ARIZ. JUV. CT. R. P. 70(A); CAL. WELF. & INST. CODE § 326.5 (West 2012); COLO. REV. STAT. ANN. § 19-3-203(3) (2012); CONN. GEN. STAT. ANN. § 46b-129a(D) (West 2012); DEL. CODE ANN. tit. 29, § 9007A(b)(1) (West 2012); D.C. CODE § 16-316(b) (2012); FLA. STAT. ANN. § 39.807 (West 2012); GA. CODE ANN. § 15-11-98(a) (West 2012); IDAHO CODE ANN. § 16-1614 (West 2012); 705 ILL. COMP. STAT. ANN. 405/2-17.1 (West 2012); KAN. STAT. ANN. § 38-2205(a) (West 2012); LA. CHILD. CODE ANN. art. 607 (2012); MICH. COMP. LAWS ANN. § 722.630 (West 2012); MISS. CODE ANN. § 93-17-8(1)(b) (West 2012); MO. ANN. STAT. § 210.160(5) (West 2012); MONT. CODE ANN. § 40-4-205(1) (West 2011); NEB. REV. STAT. ANN. § 42-358(1) (West 2012); NEV. REV. STAT. ANN. § 128.100(1) (West 2011); N.H. REV. STAT. ANN. 169-C:10 (2013); N.Y. FAM. CT. ACT § 1016 (McKinney 2012); N.C. GEN. STAT. ANN. § 7B-601(a) (West 2012); 23 PA. CONS. STAT. ANN. § 2741(b) (West 2012); S.D. CODIFIED LAWS § 26-8A-18 (2012); TENN. CODE ANN. § 37-1-149 (West 2012); TEX. FAM.

are typically appointed to represent the best interests of children in dependency proceedings, but some states also allow these advocates to be appointed in adoption cases and child custody disputes.<sup>18</sup>

Typically, guardians *ad litem* are appointed at the very outset of the judicial proceedings involving a child, e.g., after a petition for adoption or paternity has been submitted in a custody dispute, or after a petition alleging abuse or neglect has been filed in a dependency action.<sup>19</sup> In abuse and neglect cases, such petitions are almost always initiated by third parties who have observed the child first-hand and suspect abuse or neglect.<sup>20</sup> Many of these petitions stem from reports made by lay individuals, while over half are made by various professionals, such as teachers, medical personnel, social

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CODE ANN. § 51.11(c) (2011); UTAH CODE ANN. § 78A-6-902(1)(a)(i) (West 2012); VT. STAT. ANN. tit. 33, § 5112 (West 2012); VA. CODE ANN. § 16.1-266(A) (West 2012); WASH. REV. CODE ANN. § 26.44.053(1) (West 2012); WIS. STAT. ANN. § 54.40(2) (West 2011); WYO. STAT. ANN. § 14-3-211 (West 2012).

18. For examples of statutes appointing guardians *ad litem* in cases of neglect and abuse, see ALA. CODE § 26-14-11 (2012); COLO. REV. STAT. ANN. § 19-3-203(1) (West 2012); DEL. CODE ANN. tit. 29, § 9007A(a)(1) (West 2012); 705 ILL. COMP. STAT. ANN. 405/2-17.1 (West 2012); LA. CHILD. CODE ANN. art. 607(A) (2012); ME. REV. STAT. ANN. tit. 4, § 1501 (2011); MISS. CODE ANN. § 43-21-121 (West 2012); MO. ANN. STAT. § 210.160 (West 2012); MONT. CODE ANN. § 41-3-112 (West 2011); N.H. REV. STAT. ANN. 169-C:10 (2013); N.Y. FAM. CT. ACT § 1016 (McKinney 2012); N.C. GEN. STAT. ANN. § 7B-601 (West 2012); N.D. CENT. CODE ANN. § 50-25.1-08 (West 2011); OHIO REV. CODE ANN. § 2151.281(B)(1) (West 2011); OKLA. STAT. ANN. tit. 10A, § 1-4-102(c) (2012); R.I. GEN. LAWS ANN. § 40-11-14 (West 2012); S.D. CODIFIED LAWS § 26-8A-18 (2012); TENN. CODE ANN. § 37-1-149 (West 2012); UTAH CODE ANN. § 78A-2-227 (West 2012); WYO. STAT. ANN. § 14-3-211 (West 2012). For examples of statutes appointing guardians *ad litem* in cases of adoption or child custody disputes, see ALASKA STAT. ANN. § 25.23.125(b) (West 2012); CONN. GEN. STAT. ANN. § 46b-129a(2)(B) (West 2012); D.C. CODE § 16-316(b) (2012); FLA. STAT. ANN. § 39.807(2)(a) (West 2012); GA. CODE ANN. § 15-11-98(a) (West 2012); 19 GUAM CODE ANN. § 13308 (2012); IND. CODE ANN. § 31-15-6-1 (West 2012); Md. R. Fam. Law § 9-205.1; MASS. GEN. LAWS ANN. ch. 215, § 56A (West 2012); MISS. CODE ANN. § 93-17-8 (West 2012); MONT. CODE ANN. § 40-4-205 (West 2011); NEV. REV. STAT. ANN. § 128.100 (West 2011); S.C. CODE ANN. § 63-9-720 (2012).

19. See ALA. CODE § 26-10A-22(b) (2012); ALASKA R. CINA P. 11(a)(1); CAL R. CT. 5.662(c); CAL. WELF. & INST. CODE § 326.5 (West 2012); COLO. REV. STAT. ANN. § 19-3-203(1) (West 2012); DEL. CODE ANN. tit. 13, § 721 (West 2012); D.C. CODE § 16-316 (2012); GA. CODE ANN. § 19-7-44(a) (West 2012); 705 ILL. COMP. STAT. ANN. 405/2-17 (West 2012); IOWA CODE ANN. § 232.179 (West 2012); KAN. STAT. ANN. § 38-2205(a) (West 2012); MISS. CODE ANN. § 93-17-8 (West 2012); MO. ANN. STAT. § 211.462 (West 2012); MONT. CODE ANN. § 41-5-1411 (West 2011); NEB. REV. STAT. ANN. § 43-104.05 (West 2012); NEV. REV. STAT. ANN. § 432B.500(1) (West 2011); N.Y. FAM. CT. ACT §§ 1016, 1033-b(1)(a) (McKinney 2012); N.C. GEN. STAT. ANN. § 7B-601(a) (West 2012); N.D. CENT. CODE ANN. § 14-09-06.4 (West 2011); OKLA. STAT. ANN. tit. 10A, § 1-4-306(B) (West 2012); R.I. GEN. LAWS ANN. § 40-11-14 (West 2012); TEX. FAM. CODE ANN. § 107.011(a) (West 2011); UTAH CODE ANN. §§ 78A-6-902, 78B-7-202 (West 2012); VA. CODE ANN. § 16.1-266 (West 2012); W. VA. R. CHILD ABUSE & NEGLECT P. 52(a); WIS. STAT. ANN. § 54.40(1) (West 2011); WYO. STAT. ANN. § 14-2-312 (West 2012).

20. CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILD MALTREATMENT ix (2009), available at <http://archive.acf.hhs.gov/programs/cb/pubs/cm09/cm09.pdf>.

workers, or law enforcement agents.<sup>21</sup> These professions are usually governed by the “mandatory reporter” statutes found in every state.<sup>22</sup>

In most cases, guardians *ad litem* are appointed by judicial officers sua sponte, often pursuant to specific statutory requirements.<sup>23</sup>

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21. *Id.* at 6 (“For [Federal Fiscal Year] 2009, professionals submitted three-fifths of reports. Education personnel (16.5%), legal and law enforcement personnel (16.4%), social services personnel (11.4%), and medical personnel (8.2%) accounted for more than one-half (52.5%) of all reports. Professionals have reported more than one-half of all reports for the past 5 years.”).

22. ALA. CODE § 26-14-3(a) (2012); ALASKA STAT. ANN. § 47.17.020(a) (West 2012); ARIZ. REV. STAT. ANN. § 13-3620(A) (2012); ARK. CODE ANN. § 12-18-402 (West 2012); CAL. PENAL CODE § 11166(a) (West 2012); COLO. REV. STAT. ANN. § 19-3-304 (West 2012); CONN. GEN. STAT. ANN. § 17a-101(b) (West 2012); DEL. CODE ANN. tit. 16, § 903 (West 2012); D.C. CODE § 4-1321.02 (2012); FLA. STAT. ANN. § 39.201 (West 2012); GA. CODE ANN. § 19-7-5 (West 2012); HAW. REV. STAT. § 350-1.1(a) (West 2012); IDAHO CODE ANN. § 16-1605(1) (West 2012); 325 ILL. COMP. STAT. ANN. 5/4 (West 2012); IND. CODE ANN. § 31-33-5-1 (West 2012); IOWA CODE ANN. § 232.69 (West 2012); KAN. STAT. ANN. § 38-2223(a) (West 2012); KY. REV. STAT. ANN. § 620.030 (West 2012); LA. CHILD. CODE ANN. art. 609 (2012); ME. REV. STAT. ANN. tit. 22, § 4011-A(1) (2011); MD. CODE ANN. FAM. LAW § 5-704 (West 2012); MASS. GEN. LAWS ANN. ch. 119, §§ 21, 51A (West 2012); MICH. COMP. LAWS ANN. § 722.623 (West 2011); MINN. STAT. ANN. § 626.556(3) (West 2012); MISS. CODE ANN. § 43-21-353(1) (West 2012); MO. ANN. STAT. § 210.115(1) (West 2012); MONT. CODE ANN. § 41-3-201 (West 2011); NEB. REV. STAT. ANN. § 28-711(1) (West 2012); NEV. REV. STAT. ANN. § 432B.220 (West 2011); N.H. REV. STAT. ANN. § 169-C:29 (2012); N.J. STAT. ANN. § 9:6-8.10 (West 2012); N.M. STAT. ANN. § 32A-4-3(A) (West 2012); N.Y. SOC. SERV. LAW § 413 (McKinney 2012); N.C. GEN. STAT. ANN. § 7B-301 (West 2012); N.D. CENT. CODE ANN. § 50-25.1-03(1) (West 2011); OHIO REV. CODE ANN. § 2151.421 (West 2011); OKLA. STAT. ANN. tit. 10A, § 1-2-101(B) (West 2012); OR. REV. STAT. ANN. § 419B.010(1) (West 2012); 23 PA. CONS. STAT. ANN. §§ 6311(a), 6386 (West 2012); R.I. GEN. LAWS ANN. § 40-11-3(a) (West 2012); S.C. CODE ANN. § 63-7-310(A) (2012); S.D. CODIFIED LAWS § 26-8A-3 (2011); TENN. CODE ANN. § 37-1-403(a) (West 2012); TEX. FAM. CODE ANN. § 261.101 (West 2011); UTAH CODE ANN. § 62A-4a-403 (West 2012); VT. STAT. ANN. tit. 33, § 4913(a) (West 2012); VA. CODE ANN. § 63.2-1509(A) (West 2012); WASH. REV. CODE ANN. § 26.44.030(1) (West 2012); W. VA. CODE ANN. § 49-6A-2(a) (West 2012); WIS. STAT. ANN. § 48.981(2) (West 2011); WYO. STAT. ANN. § 14-3-205 (West 2012).

23. *See* ALA. CODE § 12-15-304(a) (2012); ALASKA STAT. ANN. § 25.23.125(b) (West 2012); ARIZ. REV. STAT. ANN. § 8-522(A) (2012); ARK. CODE ANN. § 9-27-316(f) (West 2012); CAL. FAM. CODE § 3150 (West 2012); COLO. REV. STAT. ANN. §§ 19-1-111, 15-14-115 (West 2012); CONN. GEN. STAT. ANN. § 46b-136 (West 2012); DEL. CODE ANN. tit. 13, § 721(c) (West 2012); D.C. CODE § 16-914(g) (2012); FLA. STAT. ANN. §§ 39.807(2), 61.401 (West 2012); GA. CODE ANN. §§ 15-11-9(b), 15-11-98(a), 19-7-44(a) (West 2012); HAW. REV. STAT. § 587A-16(a) (West 2012); IDAHO CODE ANN. § 16-1614(1) (West 2012); 705 ILL. COMP. STAT. ANN. 405/2-17(1) (West 2012); IND. CODE ANN. § 31-15-6-1 (West 2012); IOWA CODE ANN. §§ 232.112(2), 232.126, 232.179 (West 2012); KAN. STAT. ANN. § 38-2205(a) (West 2012); LA. CHILD. CODE ANN. art. 607(A) (2012); ME. REV. STAT. ANN. tit. 19-A, § 1507(1) (2011); MASS. GEN. LAWS ANN. ch. 209, § 38 (West 2012); MICH. COMP. LAWS ANN. §§ 722.630, 722.24 (West 2011); MINN. STAT. ANN. § 260C.163(5) (West 2012); MISS. CODE ANN. §§ 93-15-107, 93-17-8 (West 2012); MO. ANN. STAT. §§ 210.160(1), 211.462(1), 453.025(1) (West 2012); MONT. CODE ANN. §§ 41-3-112, 41-3-607(4) (West 2011); NEB. REV. STAT. ANN. §§ 42-358(1), 43-163(1) (West 2012); NEV. REV. STAT. ANN. §§ 128.100(1), 432B.500(1) (West 2011); N.H. REV. STAT. ANN. §§ 169-C:10, 461-A:16 (2012); N.J. STAT. ANN. § 9:2-4 (West 2012); N.M. STAT. ANN. § 32A-4-32(J) (West 2012); N.Y. FAM. CT. ACT § 1016 (McKinney 2012); N.C. GEN. STAT. ANN. §§ 7B-600(a), 7B-601, 48-2-201(b) (West 2012); N.D. CENT. CODE ANN. §§ 14-07.1-05.1, 27-20-48, 50-25.1-08 (West 2011); OHIO REV. CODE ANN. § 2151.281(A) (West 2011); OKLA. STAT. ANN.



Not surprisingly, courts enjoy broad discretion in ordering guardian *ad litem* representation for children under whatever circumstances they deem appropriate.<sup>24</sup> However, a guardian *ad litem* may also be appointed upon the motion of a party to the proceedings.<sup>25</sup>

Guardians *ad litem*, or court-appointed special advocates, are frequently chosen from a pool of attorney or non-attorney volunteers who have received particularized training in advocating for the best interests of children.<sup>26</sup> Every jurisdiction has its own unique appointment procedure, comprising variations on a common theme. In Alaska, for example, the guardian *ad litem* may be an employee of the Office of Public Advocacy.<sup>27</sup> In the District of Columbia, the guardian *ad litem* is selected from a list of attorneys prepared and maintained by the Family Court.<sup>28</sup>

In all jurisdictions, the function of an appointed guardian *ad litem* is to represent and advocate for the child's best interests in the legal system.<sup>29</sup> Specifically, the duties of these advocates include, but are not limited to: meeting with the child in person at least once and preferably on a regular basis, conducting an independent investigation of the circumstances giving rise to the judicial proceedings, writing reports for the court, attending all hearings involving the child, explaining the proceedings to the child in a manner that he or she can

tit. 10A, § 1-4-306(A)(2) (West 2012); OR. REV. STAT. ANN. § 2(1) (West 2012); 23 PA. CONS. STAT. ANN. §§ 5334(a), 5335(a) (West 2012); R.I. GEN. LAWS ANN. § 40-11-14 (West 2012); S.C. CODE ANN. §§ 63-3-810, 63-9-720 (2012); S.D. CODIFIED LAWS §§ 26-8A-9, 26-8A-20 (2012); TENN. CODE ANN. §§ 36-4-132(a), 37-1-149(a), 37-1-610(a) (West 2012); UTAH CODE ANN. §§ 78A-2-227(1), 78A-2-228(1), 78A-6-902 (West 2012); VT. STAT. ANN. tit. 15, § 669, tit. 15A, § 3-201, tit. 33, § 5112 (West 2012); VA. CODE ANN. § 16.1-266 (West 2012); WASH. REV. CODE ANN. §§ 13.34.100(1), 13.36.080, 26.12.175(1)(a), 26.44.053(1) (West 2012); W. VA. CODE ANN. § 48-9-302 (West 2012); WIS. STAT. ANN. § 48.235(1) (West 2011); WYO. STAT. ANN. §§ 14-3-211, 14-6-216 (West 2012).

24. See, e.g., COLO. REV. STAT. ANN. § 19-3-203(1) (West 2012) ("Nothing in this section shall limit the power of the court to appoint a guardian [*ad litem*] prior to the filing of a petition for good cause.").

25. See, e.g., ALA. CODE § 26-10A-22(b) (2012); ALASKA STAT. ANN. § 25.24.310(a) (West 2012); GA. CODE ANN. § 15-11-9(b) (West 2012); N.M. STAT. ANN. § 32A-5-33 (West 2012); N.D. CENT. CODE ANN. §§ 14-07.1-05.1, 14-09-06.4, 27-20-48 (West 2011); 23 PA. CONS. STAT. ANN. § 5334(a) (West 2012); TENN. CODE ANN. § 37-1-149(a)(1) (West 2012).

26. See, e.g., ALA. CODE § 12-15-304(c) (2012); ALASKA R. CINA P. 11(c); CAL. R. CT. 5.655; DEL. CODE ANN. tit. 29, § 9007A(c)(2) (West 2012); GA. CODE ANN. § 15-11-9.1(a)(1) (West 2012); 705 ILL. COMP. STAT. ANN. 405/2-17(9) (West 2012); MD. CODE ANN., CTS. & JUD. PROC. § 3-830 (West 2012); MONT. CODE ANN. § 41-3-112(2) (West 2011); TENN. CODE ANN. § 37-1-149(2) (West 2012); TEX. FAM. CODE ANN. §§ 107.004(b), 107.011(b) (West 2011); UTAH CODE ANN. § 78A-6-902(3)(b) (West 2012); WASH. REV. CODE ANN. § 26.12.175(3) (West 2012).

27. See ALASKA R. CINA P. 11(a)(2).

28. See D.C. R. NEGLECT & ABUSE 42(a).

29. See Cromley, Jr., *supra* note 1, at 567 ("Sometimes known also as a 'best friend,' the guardian [*ad litem*] lends voice to the best interests of the child so that the system will not fail to maintain a focus on the forest through the trees.").

understand, monitoring the child's case, and determining whether the services offered to the child and his or her family are being utilized in the most effective way.<sup>30</sup> In addition, guardians *ad litem* have certain procedural rights, e.g., receiving notice of all hearings and having access to the child's records.<sup>31</sup> In some states, appointed guardians *ad litem* are actually recognized as a party to the proceedings, and accordingly, they can file pleadings and even examine witnesses.<sup>32</sup> This, of course, is especially true of attorney guardians *ad litem*.<sup>33</sup>

Michigan, a state with roughly twice the population of Wisconsin,<sup>34</sup> has long recognized the need of children to be "specially represented in legal matters involving them."<sup>35</sup> This representation extends

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30. See, e.g., ALA. CODE § 12-15-304(b) (2012); ALASKA R. CINA P. 11(f); ARIZ. REV. STAT. ANN. § 8-522(E) (2012); ARK. CODE ANN. § 9-27-316(f)(3) (West 2012); COLO. REV. STAT. ANN. § 19-1-208 (West 2012); DEL. CODE ANN. tit. 29, § 9007A(c), tit. 31, § 3606 (West 2012); FLA. STAT. ANN. § 39.807(2)(b) (West 2012); GA. CODE ANN. § 15-11-9.1(d) (West 2012); HAW. REV. STAT. § 587A-16(c) (West 2012); IDAHO CODE ANN. § 16-1633 (West 2012); 705 ILL. COMP. STAT. ANN. 405/2-17 (West 2012); IOWA CODE ANN. § 598.12(2)(a) (West 2012); ME. REV. STAT. ANN. tit. 19-A, § 1507(3) (2011); MD. CODE ANN. CTS. & JUD. PROC. § 3-830 (West 2012); MICH. COMP. LAWS ANN. § 712A.17d (West 2011); MINN. STAT. ANN. § 260C.163(5)(b) (West 2012); MISS. CODE ANN. § 93-17-8(1)(b) (West 2012); MO. ANN. STAT. § 453.025(4) (West 2012); MONT. CODE ANN. §§ 40-4-205(2), 41-3-112(3) (West 2011); NEV. REV. STAT. ANN. § 432B.500(3) (West 2011); N.M. STAT. ANN. § 32A-1-7(E) (West 2012); N.C. GEN. STAT. ANN. § 7B-601(a) (West 2012); OKLA. STAT. ANN. tit. 10A, § 1-4-306(B)(3) (West 2012); OR. REV. STAT. ANN. § 2(2) (West 2012); 23 PA. CONS. STAT. ANN. § 5334(b) (West 2012); TEX. FAM. CODE ANN. §§ 107.002(a), 107.003(1) (West 2011); UTAH CODE ANN. § 78A-6-902(3) (West 2012); VT. R. FAM. P. 6(e); W. VA. R. CHILD ABUSE & NEGLECT P. 52(b); WIS. STAT. ANN. §§ 48.235(3), 54.40(3) (West 2011).

31. See, e.g., ARIZ. REV. STAT. ANN. § 8-522(F)-(G) (2012); ARK. CODE ANN. § 9-27-316(f)(4) (West 2012).

32. See, e.g., ALA. CODE § 12-15-304 (2012); ALASKA R. CINA P. 11; COLO. REV. STAT. ANN. §§ 19-1-111, 19-3-203 (West 2012); DEL. CODE ANN. tit. 13, § 2302 (West 2012); FLA. STAT. ANN. § 61.401 (West 2012); IDAHO CODE ANN. § 16-1634 (West 2012); IOWA CODE ANN. § 232.112 (West 2012); ME. REV. STAT. ANN. tit. 19-A, § 1507 (2011); MICH. COMP. LAWS ANN. § 712A.17d (West 2011); MO. ANN. STAT. § 211.462 (West 2012); N.M. STAT. ANN. § 32A-1-7 (West 2012); N.C. GEN. STAT. ANN. § 7B-601 (West 2012); OKLA. STAT. ANN. tit. 10A, § 1-4-306 (West 2012); OR. REV. STAT. ANN. § 2 (West 2012); 23 PA. CONS. STAT. ANN. § 5334 (West 2012); UTAH CODE ANN. § 78A-2-228 (West 2012); WASH. REV. CODE ANN. § 13.34.100 (West 2012).

33. See, e.g., DEL. CODE ANN. tit. 29, § 9007A(b)(3) (West 2012).

34. According to United States census data, the population of Michigan in 2010 was approximately 9,883,635, and the population of Wisconsin was approximately 5,686,986. *Michigan*, U.S. CENSUS BUREAU: STATE & COUNTRY QUICKFACTS, <http://quickfacts.census.gov/qfd/states/26000.html> (last revised Mar. 14, 2013); *Wisconsin*, U.S. CENSUS BUREAU: STATE & COUNTRY QUICKFACTS, <http://quickfacts.census.gov/qfd/states/55000.html> (last revised Mar. 14, 2013).

35. Children's Task Force, State Bar of Michigan, *Guidelines for Advocates for Children in Michigan Courts*, [http://www.law.yale.edu/rcw/rcw/jurisdictions/am\\_n/usa/michigan/mich\\_guidelines.htm](http://www.law.yale.edu/rcw/rcw/jurisdictions/am_n/usa/michigan/mich_guidelines.htm) (last visited Mar. 23, 2013). The report continues: "[T]he child needs an independent advocate whose function, among others, is to help the child through the difficult process. By definition, fundamental aspects of the child's life are being threatened in these legal proceedings. The child could lose mother, father, sister, brother, extended

to the use of guardians *ad litem*.<sup>36</sup> Michigan Court Rule (MCR) 3.915 governs the appointment of counsel for children in protective proceedings and provides in pertinent part: “The court must appoint a lawyer-guardian [*ad litem*] to represent the child at every hearing, including the preliminary hearing. The child may not waive the assistance of a lawyer-guardian [*ad litem*].”<sup>37</sup> Moreover, Section 10 of Michigan’s Child Protection Law (CPL) expressly mandates: “In each case filed under this act in which judicial proceedings are necessary, the court *shall* appoint a lawyer-guardian [*ad litem*] to represent the child.”<sup>38</sup>

Section 2 of the CPL defines “child” as “a person under 18 years of age.”<sup>39</sup> Many other states have similar definitions of “child,” but this legislation does not specify what “person” means for purposes of providing legal representation for children who are abused or neglected.<sup>40</sup> Consequently, while it is clear that lawmakers intended for courts to appoint guardians *ad litem* to represent children in all child protective proceedings, it is less apparent whether these services are limited only to born children. Many courts do afford legal protection to prenatal children under certain limited circumstances,<sup>41</sup> but

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family, school, or community. On the other hand, the child faces the prospect of harm at the hands of an unfit caretaker, or of systemic indecision as to what ought to happen to him or her.” *See id.*

36. *Id.* (“This representation not only requires the appointment of legal counsel, but also extends to the use of guardians [*ad litem*], special advocates and other advisors to the court.”).

37. MICH. CT. R. 3.915(B)(2)(A).

38. MICH. COMP. LAWS ANN. § 722.630 (West 2012) (emphasis added).

39. *Id.* § 722.622(e).

40. *See, e.g.*, ALA. CODE § 26-14-1 (2012); CAL. WELF. & INST. CODE § 101(b) (West 2012); COLO. REV. STAT. § 19-1-103(18) (West 2012); DEL. CODE ANN. tit. 29, § 9002A(4) (West 2012); FLA. STAT. ANN. § 39.01(12) (West 2012); GA. CODE ANN. § 15-11-2(2) (West 2012); IDAHO CODE ANN. § 16-1602(7) (West 2012); 705 ILL. COMP. STAT. ANN. 405/1-3(10) (West 2012); IND. CODE ANN. § 31-9-2-13(e) (West 2012); KAN. STAT. ANN. § 38-2202(d) (West 2012); KY. REV. STAT. ANN. § 600.020(8) (West 2012); ME. REV. STAT. ANN. tit. 22, § 4002(2) (2012); MICH. COMP. LAWS ANN. § 722.622(e) (West 2012); MINN. STAT. ANN. § 260C.007(4) (West 2012); MO. ANN. STAT. § 210.110(4) (West 2012); NEB. REV. STAT. ANN. § 43-245(7) (West 2012); NEV. REV. STAT. ANN. § 128.0124 (West 2011); N.H. REV. STAT. ANN. § 169-C:3(V) (2012); N.J. STAT. ANN. § 30:4C-2(b) (West 2012); N.C. GEN. STAT. ANN. § 7B-101(14) (West 2012); OHIO REV. CODE ANN. § 2151.011(B)(6) (West 2012); OKLA. STAT. ANN. tit. 10A, § 1-1-105(7) (West 2012); OR. REV. STAT. ANN. § 418.001 (West 2012); 23 PA. CONS. STAT. ANN. § 2732 (West 2012); R.I. GEN. LAWS ANN. § 40-11-2(2) (West 2012); S.C. CODE ANN. § 63-7-20(3) (2012); TENN. CODE ANN. § 37-1-102(b)(4)(A) (West 2012); TEX. FAM. CODE ANN. § 101.003(a) (West 2012); UTAH CODE ANN. § 78A-6-105(6) (West 2012); VA. CODE ANN. § 16.1-228 (West 2012); WASH. REV. CODE ANN. § 26.44.020(2) (West 2012); W. VA. CODE ANN. § 49-1-2 (West 2012); WYO. STAT. ANN. § 14-3-202(a)(iii) (West 2011).

41. *See, e.g.*, Mack v. Carmack, 79 So. 3d 597 (Ala. 2011) (holding that the state Wrongful Death Act permits action for the death of a preivable fetus); Commonwealth v. Bullock, 913 A.2d 207 (Pa. 2006) (holding that the state may charge someone responsible for the death of a prenatal child with criminal homicide); Meyer v. Burger King Corp.,

it is not clear whether most state legislatures intended for the term “child” to *exclude* prenatal children.

*B. The Role of Guardians Ad Litem in Foreign Jurisdictions*

Child advocates are also routinely appointed in foreign jurisdictions, but their role is not always described with the term “guardian *ad litem*.” For example, the functional equivalent of a guardian *ad litem* in Scotland is the “safeguarder,” an appointed advocate who represents the best interest of the child during “children’s hearings.”<sup>42</sup> In Norway, the guardian *ad litem* acts as a spokesperson for the child.<sup>43</sup> The purpose of this spokesperson is to “attend to the child’s interests in connection with the court action.”<sup>44</sup> In France, temporary guardians are appointed for children in all proceedings involving the termination of parental rights for the purpose of requesting a permanent guardianship for the child.<sup>45</sup> In Ireland, guardians are appointed for infants in actions against them or on their behalf.<sup>46</sup>

In British Columbia, guardians are routinely appointed to oversee minors’ estates.<sup>47</sup> Courts situated in Ontario appoint legal representation for abused children in all cases involving potential termination of parental rights.<sup>48</sup> In Alberta, the Office of the Child and Youth Advocate is permitted by statute to appoint lawyers to represent children receiving services.<sup>49</sup>

The United Kingdom, too, has instituted a Children and Family Court Advisory and Support Service (Service) that is quite similar to the Office of Child and Youth Advocate located in Alberta.<sup>50</sup> The purpose of the Service is to “(a) safeguard and promote the welfare of the children, (b) give advice to any court about any application made to it in such proceedings, (c) make provision for the children to be represented in such proceedings, [and] (d) provide information, advice and other support for the children and their families.”<sup>51</sup>

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26 P.3d 925 (Wash. 2001) (holding that a parent may bring action for injuries suffered by prenatal child).

42. Children’s Hearings (Scotland) Act, 2011, (A.S.P. 1), § 3, ¶ 30.

43. Act. No. 7, Apr. 8, 1981, ch. 7, § 61, “The Children Act” (Nor.).

44. *Id.*

45. CODE CIVIL [C. civ.] art. 380 (Fr.).

46. Circuit Court Rules 2001 (S.I. No. 510/2001) (Ir.), available at <http://www.irishstatutebook.ie/2001/en/si/0510.html>.

47. Child, Family and Community Service Act, R.S.B.C. 1996, c. 46, art. 58 (Can.).

48. Child and Family Services Act, R.S.O. 1990, c. C.11, art. 38 (Can.).

49. Child, Youth and Family Enhancement Act, R.S.A. 2000, c. C-12, § 112 (Can.).

50. Criminal Justice and Court Services Act, 2000, c. 43, § 11 (Eng.).

51. *Id.*

Perhaps the most promising child welfare legislation abroad can be found in Germany.<sup>52</sup> There, children are provided with appointed legal guardians if their parents are not entitled to represent them.<sup>53</sup> A legal guardian will also be appointed if the child's personal status cannot be determined.<sup>54</sup> Significantly, German law expressly recognizes that "[i]f it is to be assumed that a child needs a guardian upon birth, *then even before the birth of the child a guardian may be appointed*; the appointment takes effect on the birth of the child."<sup>55</sup> Germany is the only European country researched for this article whose legislation makes any mention of appointing child advocates for prenatal children, although such appointment does not actually take effect until after the child is born.<sup>56</sup>

Several Latin American countries allow for the appointment of guardians *ad litem* for unborn children for the purposes of property, succession, or inheritance rights. Argentina and Honduras, for instance, allow representation of unborn children by a guardian *ad litem* in cases involving property or inheritance rights.<sup>57</sup> Brazil also allows for prenatal representation and grants preference to the biological mother as a potential guardian *ad litem*.<sup>58</sup> El Salvador allows either the mother, both parents, or third parties to be appointed as guardians *ad litem* for unborn children and places some limits on their

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52. *Children's Rights: Germany*, LIBRARY OF CONG., <http://www.loc.gov/law/help/child-rights/germany.php> (last updated Jan. 25, 2013). The Library of Congress summarizes that:

In Germany the parents are primarily responsible for raising their children, yet governmental policy protects and supports children and youth in various ways to promote their personal and social development and to assure that they will find their place in the world when they are adults. These goals are accomplished through protective legislation and various forms of assistance. . . . Germany ratified the Convention on the Rights of the Child in February 1992, and it became effective for Germany on April 5, 1992. However, when Germany deposited the ratification documents, it made interpretative statements and reservations that show that Germany views the Convention as a welcome development in international law that hopefully will improve the situation of children worldwide, and that Germany will play its part, in keeping with article 3 paragraph 2 of the Convention, by drafting legislation to live up to the spirit of the Convention and to ensure the well-being of the child."

*Id.*

53. BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], Jan. 2, 2002, BUNDESGESETZBLATT [BGBl. I] 42, as amended, § 1773 (Ger.).

54. *Id.*

55. *Id.* § 1774 (emphasis added).

56. *Id.*

57. CÓDIGO CIVIL [CÓD. CIV.] [CIVIL CODE] art. 64 (Arg.); CÓDIGO CIVIL [CIVIL CODE] arts. 414, 429 (Hon.).

58. Lei No. 5.869, de 11 de Janeiro de 1973, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] (Braz.), available at <http://jusbrasil.com.br/legislacao/91735>.

authority.<sup>59</sup> Colombia and Chile allow for guardians *ad litem* for unborn children to be named in a will and permits their appointment for inheritance and other purposes relating to property rights.<sup>60</sup>

### C. *The Rights of Prenatal Children Under International Law*

Although many European countries utilize guardians *ad litem* or their functional equivalents to protect born children from abuse and neglect, it appears that none of these foreign jurisdictions appoint advocates to protect prenatal children. Moreover, although the Convention on the Rights of the Child (CRC) provides that signatories are to take appropriate measures to protect children from abuse and neglect,<sup>61</sup> the CRC has never been judicially interpreted to grant rights to prenatal children, although some scholars have argued that it should be.<sup>62</sup>

Among the numerous rights recognized by the CRC are freedom of expression, freedom of religion, freedom of assembly, freedom from abuse and neglect, and freedom from cruel and inhuman punishment or being imprisoned arbitrarily and without a fair trial.<sup>63</sup> Not unlike current child welfare legislation found in many states, the CRC defines “child” as a person under eighteen years of age “unless under the law applicable to the child, majority is attained earlier.”<sup>64</sup> The CRC further acknowledges that “every child has the inherent right to life” and expressly directs states to “ensure to the maximum extent possible the survival and development of the child.”<sup>65</sup>

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59. CÓDIGO CIVIL [CIVIL CODE] arts. 238, 486, 490 (El Sal.).

60. CÓDIGO CIVIL [C.C.] [CIVIL CODE] art. 433, 446 (Colom.); CÓDIGO CIVIL [C.C.] [CIVIL CODE] art. 343, 356 (Chile).

61. Convention on the Rights of the Child, art. 19, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990) (“States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.”).

62. Dr. John I. Fleming & Dr. Michael G. Hains, *What Rights, If Any, Do The Unborn Have Under International Law?*, 16 AUSTL. B. REV. 181, 198 (1997) (arguing that the born-unborn distinction is an unjust, discriminatory distinction).

63. Convention on the Rights of the Child, *supra* note 61, at arts. 13–15, 19, 37.

64. *Id.* at art. 1.

65. *Id.* at art. 6. *But see* Case of A, B, and C v. Ireland, App. No. 25579/05, Eur. Ct. H.R. (2010). In this recent landmark decision, the European Court of Human Rights (ECHR) ruled that although the ECHR does not confer a right to obtain an abortion, Ireland violated Article 8 with regard to applicant C, a former cancer patient who travelled to England for an abortion because it was unclear whether she could have access to an abortion in a situation where she believed that her pregnancy was life threatening. *Id.*

## II. LEGAL PROTECTION FOR PRENATAL CHILDREN

### A. *Guardians Ad Litem Are Already Being Appointed for Prenatal Children in Certain Legal Contexts*

Many courts have already demonstrated a willingness to protect prenatal children from neglect and abuse under certain limited circumstances, both by judicial decision and through guardian *ad litem* representation.<sup>66</sup> In addition to child protective proceedings, various statutes expressly provide child advocacy for prenatal children for a wide variety of other purposes.<sup>67</sup> For example, nearly all state legislatures, as well as the District of Columbia, have adopted a specific statutory provision permitting the appointment of guardians *ad litem* for prenatal children in trust or probate proceedings.<sup>68</sup> Some states

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66. See, e.g., *In re Ruiz*, 500 N.E.2d 935 (Ohio Ct. Com. Pl. 1986) (holding that the child abuse statute covers prenatal children); *Whitner v. State*, 492 S.E.2d 777 (S.C. 1997) (holding that a mother could be held guilty for child neglect for ingesting drugs during pregnancy).

67. See, e.g., 720 ILL. COMP. STAT. ANN. 525/4.1(h) (West 2012) (providing for appointment in cases of illegal compensation for adoption); LA. CIV. CODE ANN. art. 252 (2012) (providing for appointment of a curator to protect the interests of a child unborn at the time of its father's death); MICH. COMP. LAWS ANN. § 600.2045(1) (West 2012) (providing for appointment in cases other than probate in which the unborn child might have an interest); MISS. R. CIV. P. 17(c) (providing for appointment any time an unborn child's interests are before the court); 20 PA. CONS. STAT. ANN. § 751(5) (West 2012) (providing for appointment in cases in the orphan's court); WIS. STAT. ANN. § 48.20(3), 48.203(7) (West 2011) (providing that if a pregnant minor or adult, respectively, is held in custody, the unborn child's guardian *ad litem* must be made aware of the location of her detention).

68. ALA. CODE § 19-3B-305 (2012); ALASKA STAT. ANN. § 13.06.120 (West 2012); ARIZ. REV. STAT. ANN. § 14-1408 (2012); ARK. CODE ANN. § 28-73-305 (West 2012); CAL. PROB. CODE § 1003 (West 2012); COLO. REV. STAT. ANN. § 15-10-403 (West 2012); CONN. GEN. STAT. ANN. § 45a-132 (West 2012); DEL. CODE ANN. tit. 12, § 2905 (West 2012); D.C. SUPERIOR CT. R. PROB. DIV. 209; FLA. STAT. ANN. § 731.303 (West 2012); GA. CODE ANN. § 44-6-173 (West 2012); HAW. REV. STAT. § 560:1-403 (West 2012); IDAHO CODE ANN. § 15-1-403 (West 2012); IND. CODE ANN. § 29-1-1-20 (West 2012); IOWA CODE ANN. § 633A.6306 (West 2011); KAN. STAT. ANN. § 59-2205 (West 2012); KY. REV. STAT. ANN. § 389A.035 (West 2012); ME. REV. STAT. ANN. tit. 18-A, § 1-403 (2011); MASS. GEN. LAWS ANN. ch. 203E, § 305 (West 2011); MICH. COMP. LAWS ANN. § 700.1403 (West 2012); MINN. STAT. ANN. §§ 501B.19, 524.1-403 (West 2012); MO. ANN. STAT. § 472.300 (West 2011); MONT. CODE ANN. § 72-1-303 (West 2012); NEB. REV. STAT. ANN. § 30-2222 (West 2011); NEV. REV. STAT. ANN. § 155.140 (West 2011); N.H. REV. STAT. ANN. § 564-B:3-305 (2011); N.M. STAT. ANN. § 45-1-403 (West 2012); N.Y. SURR. CT. PROC. ACT § 315 (McKinney 2011); N.C. GEN. STAT. ANN. § 36C-3-305 (West 2011); N.D. CENT. CODE ANN. § 30.1-03-03 (West 2011); OHIO REV. CODE ANN. § 5803.05 (West 2011); OR. REV. STAT. ANN. § 130.120 (West 2012); R.I. GEN. LAWS ANN. § 33-22-17 (West 2011); S.C. CODE ANN. § 62-3-715 (2012); S.D. CODIFIED LAWS § 55-3-32 (2012); TENN. CODE ANN. § 35-15-305 (West 2011); TEX. PROB. CODE ANN. § 115.014 (West 2011); TEX. PROB. CODE ANN. § 37A (West 2011); UTAH CODE ANN. § 75-1-403 (West 2012); VT. STAT. ANN. tit. 14, § 202 (West 2011); VA. CODE ANN. § 64.2-713 (West 2011); WASH. REV. CODE ANN. § 11.96A.160 (West 2011); WIS. STAT. ANN. § 701.15 (West 2011); WYO. STAT. ANN. § 4-10-305 (West 2011); see also 735 ILL. COMP.

also allow guardians *ad litem* to represent the property interests of unborn children.<sup>69</sup> In at least one known case, a judge ruled that a prenatal child is a living person for purposes of recovering damages after the wrongful death of a sibling.<sup>70</sup> Moreover, some statutes actually mandate that prenatal children be treated as persons in cases in which they have an interest.<sup>71</sup>

In addition to this abundance of cases involving the welfare of prenatal children outside of the context of child protective proceedings, some courts have even appointed guardians *ad litem* to represent the unborn in abortion proceedings.<sup>72</sup> In fact, guardians *ad litem* have been appointed for the general class of prenatal children in cases challenging the constitutionality of abortion restrictions.<sup>73</sup> Some

STAT. ANN. 5/2-501 (West 2011) (providing for appointment of guardians *ad litem* for persons “not in being” in probate cases); W. VA. CODE ANN. § 42-1-8 (West 2011) (providing that an unborn child can inherit as if born).

69. MASS. GEN. LAWS ANN. ch. 79, § 30 (West 2012) (eminent domain cases); N.H. REV. STAT. ANN. § 498-A:23 (2013) (eminent domain cases); N.C. R. CIV. P. 17(b)(4) (in rem, quasi in rem, probate, and other cases affecting an interest in property); N.C. GEN. STAT. ANN. § 35A-1343 (West 2012) (administration of the unborn child’s estate); OHIO REV. CODE ANN. § 2307.131 (West 2011) (cases in which an unborn child has a future interest); 20 PA. CONS. STAT. ANN. § 8305 (West 2012) (cases in which an unborn child has a property interest); VA. CODE ANN. § 8.01-94 (West 2012) (cases involving sale of real estate).

70. *Fizer v. Davis* (*In re Estate of Davis*), 706 So. 2d 244, 245 (Miss. 1998).

71. *See, e.g.*, LA. CIV. CODE ANN. art. 26 (2012); MONT. CODE ANN. § 41-1-103 (West 2011).

72. *In re Anonymous*, 720 So. 2d 497, 498 (Ala. 1998); *In re Estate of D.W.*, 481 N.E.2d 355, 356 (Ill. App. Ct. 1985) (lacking a discussion by the appellate court of the appropriateness of the trial court’s appointment of a guardian *ad litem* for the fetus of a mentally incompetent woman whose mother/guardian wanted to consent to her abortion); Helena Silverstein, *In the Matter of Anonymous, A Minor: Fetal Representation in Hearings to Waive Parental Consent for Abortion*, 11 CORNELL J.L. & PUB. POL’Y 69, 87 (2001) (“Including the first case of guardianship appointment, there have been at least 17 instances in which minors, seeking to waive parental consent, have been questioned by an appointed representative of the fetus.”). *But see In re T.W.*, 551 So. 2d 1186 (Fla. 1989). The trial court appointed a guardian *ad litem* for a prenatal child carried by a juvenile who was petitioning for an abortion without parental consent. *Id.* at 1189. The guardian *ad litem* for the prenatal child appealed the granting of the minor’s petition. *Id.* The Florida Supreme Court stated, “we find that the appointment of a guardian [*ad litem*] for the fetus was clearly improper.” *Id.* at 1190; *In re D.K.*, 497 A.2d 1298, 1301 (N.J. Super. Ct. Ch. Div. 1985) (holding that the appointment of a guardian *ad litem* for the fetus of a schizophrenic woman was inappropriate and that the guardian had no standing to bring an incompetency petition before the court); *In re Klein*, 145 A.D.2d 145, 147 (N.Y. App. Div. 1989) (holding that a person’s application to be the guardian *ad litem* for the non-viable fetus of a mentally incompetent woman whose husband was appointed her guardian to assent to her abortion was properly denied because such a fetus was not a recognized person for the purpose of such proceedings).

73. *Larkin v. Cahalan*, 208 N.W.2d 176, 177, 179 (Mich. 1973) (contesting the constitutionality of a law prohibiting abortion drugs in which guardians *ad litem* were permitted to intervene; the Appeals Court said nothing about the permissibility of the guardians *ad litem* being appointed). *But see Benten v. Kessler*, No. CV-92-3161(CPS), 1992 WL 266926, at \*5 (E.D.N.Y. Sept. 30, 1992) (refusing to allow the appointment of a guardian *ad litem* for an unborn child in a proceeding challenging the illegality of RU486, an abortifacient).



commentators have further argued that prenatal children must be accorded full rights as a matter of constitutional law.<sup>74</sup> In view of this widespread existing legal precedent regarding advocacy for children before they are born, there is already a sound framework established to protect the rights of abused or neglected prenatal children outside of the context of abortion.

### *B. Compelled Medical Treatment for Prenatal Children Against Their Mothers' Wishes*

When should the legal status of a prenatal child be recognized as being the same as that of a newborn infant? Not surprisingly, the amount of legal protection afforded to prenatal children varies greatly depending on the specific area of law. Likewise, judicial interpretation of existing legislation may vary significantly based upon the totality of circumstances surrounding a particular case. Even so, the duty of parents to protect unborn babies developing in the womb continues to evolve.<sup>75</sup> Many courts have compelled pregnant women to submit to medical care, such as blood transfusions<sup>76</sup> and cesarean sections,<sup>77</sup> to protect the health of their prenatal children.

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74. Charles I. Lugosi, *Conforming to the Rule of Law: When Person and Human Being Finally Mean the Same Thing in Fourteenth Amendment Jurisprudence*, 22 ISSUES L. & MED. 119, 198–99 (2006–2007) (reviewing the history of Supreme Court jurisprudence regarding the artificial personhood of corporations under the Fourteenth Amendment and arguing that prenatal babies have a better claim to personhood under this jurisprudence than corporations do).

75. Thomas W. Strahan, *Legal Protection of the Unborn Child Outside the Context of Induced Abortion*, 11 ASS'N FOR INTERDISC. RES. VALUES & SOC. CHANGE 1, available at [http://lifeissues.net/writers/air/air\\_vol11no1\\_1997.html](http://lifeissues.net/writers/air/air_vol11no1_1997.html) (“The duty of parents to protect their children, in instances not involving induced abortion, has been applied to the care and protection of unborn children in the womb. Cases of this type have occurred both before and after the 1973 decision in [*Roe v. Wade*].”).

76. Raleigh Fitkin-Paul Morgan Mem'l Hosp. v. Anderson, 201 A.2d 537, 538 (N.J. 1964) (ordering a blood transfusion over the objections of the mother in the event that it was necessary to save her life or the life of her unborn child); Hoener v. Bertinato, 171 A.2d 140, 145 (N.J. Juv. & Dom. Rel. Ct. 1961) (awarding custody to the county welfare department for purposes of administering a blood transfusion); *In re Jamaica Hosp.*, 491 N.Y.S.2d 898, 900 (Sup. Ct. 1985) (ordering a blood transfusion to protect the life of an 18-week-old unborn child over the objections of the mother). *But see*, *People v. Brown (In re Fetus Brown)*, 689 N.E.2d 397, 406 (Ill. App. Ct. 1997) (“In conclusion, the circuit court erred in appointing a temporary custodian for Fetus Brown with the authority to consent to blood transfusions for Darlene Brown and erred in appointing the public guardian as guardian *ad litem* for Fetus Brown.”).

77. Pemberton v. Tallahassee Mem. Reg'l Med. Ctr., Inc., 66 F. Supp. 2d 1247, 1251 (N.D. Fl. 1999) (holding that the State's interest in protecting the unborn child's life superseded the mother's right to refuse a cesarean section); *Jefferson v. Griffin Spalding Cnty. Hosp. Auth.*, 274 S.E.2d 457, 458, 460 (Ga. 1981) (authorizing the county hospital to perform a cesarean section on the mother of a 39-week-old unborn child in the event she presented herself to the hospital); *but see* *People v. Doe (In re Baby Boy Doe)*, 632 N.E.2d 326,

Not surprisingly, however, court orders regarding compelled medical care routinely become the subject of bitter, prolonged litigation. One such case in which an appellate court refused to uphold an order requiring a pregnant woman to submit to medical treatment for the sake of her unborn child was recently decided in Florida.<sup>78</sup> In that case, a circuit court order compelling a pregnant woman to submit to hospitalization, intravenous medication, and anticipated surgical delivery was overturned even after the controversy between the parties became moot by the unborn child's death mere days after the order was entered.<sup>79</sup> In so ruling, the appellate court reasoned: "Only after the threshold determination of viability has been made may the court weigh the state's compelling interest to preserve the life of the fetus against the patient's fundamental constitutional right to refuse medical treatment."<sup>80</sup> Significantly, however, the ruling in this case did not declare that the government lacks a compelling interest to protect a prenatal child at all stages of pregnancy; rather, the requisite balancing test only applies to viable prenatal children.<sup>81</sup> Thus, once a prenatal child is deemed viable, the State may take legal action to protect his or her health.<sup>82</sup>

The legitimacy of this concept was recognized in an amicus brief filed by the American Civil Liberties Union over two decades ago, which included a report prepared by the American Medical Association discussing the propriety of judicial intervention to protect the welfare of prenatal children:

If an exceptional circumstance could be found in which a medical treatment poses an insignificant—or no—health risk to the woman, entails a minimal invasion of her bodily integrity,

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326 (Ill. App. Ct. 1994) ("[W]e hold that . . . a woman's competent choice to refuse medical treatment as invasive as a cesarean section during pregnancy must be honored, even in circumstances where the choice may be harmful to her fetus.").

78. *Burton v. State*, 49 So. 3d 263 (Fla. Dist. Ct. App. 2010).

79. *Id.* at 264.

80. *Id.* at 266.

81. *Id.* at 265.

82. See Carrie Ann Wozniak, Comment, *Difficult Problems Call for New Solutions: Are Guardians Proper for Viable Fetuses of Mentally Incompetent Mothers in State Custody?*, 34 STETSON L. REV. 193, 226 (2004). Wozniak explains:

To avoid undue infringement of the mother's right to privacy, viability is the logical point at which a court should appoint a guardian for a fetus in a situation [where a mentally incompetent woman is pregnant]. One could argue that the state has a compelling interest in the fetus's health before viability because *Roe* and *Casey* discuss only the state's compelling interest in fetal *life*; there is no mention of fetal *health*. Therefore, it would be allowable for a court to appoint a guardian for a fetus as soon as the mother's pregnancy is apparent, even if this is before viability, to ensure the fetus's health.

*Id.*

and would clearly prevent substantial and irreversible harm to her fetus, *it might be appropriate for a physician to seek judicial intervention*. However, the fundamental principle against compelled medical procedures should be a control in all cases that do not present such exceptional circumstances.<sup>83</sup>

Indeed, numerous courts have required pregnant women to submit to medical procedures against their wishes to save their unborn children when the mother will also benefit from the procedure or if the risk of harm to their own health is minimal. One such court order was fiercely litigated in Florida after an expectant mother left the hospital against medical advice and was thereafter forced to return against her will.<sup>84</sup>

In the case of *Pemberton v. Tallahassee Memorial Regional Medical Center, Inc.*, a pregnant woman was ultimately forced to have a cesarean section after multiple physicians concluded that vaginal birth posed “a substantial and unacceptable risk of death” to her child.<sup>85</sup> Notably, Ms. Pemberton had delivered her previous baby by cesarean section in 1995.<sup>86</sup> When Ms. Pemberton became pregnant again in 1996, she was unable to find a physician who would allow her to deliver vaginally; consequently, she attempted to deliver her baby at home, unattended by any physician and “without any backup arrangement with a hospital.”<sup>87</sup> After more than a day of grueling labor, Ms. Pemberton decided to go to the emergency room to request intravenous fluids.<sup>88</sup> A board-certified physician advised Ms. Pemberton that she needed to have a cesarean section, but she adamantly refused and “left the hospital against medical advice, apparently surreptitiously.”<sup>89</sup> The hospital called an attorney, who in turn contacted the State Attorney, at which time a special assistant was deputized to handle the legal controversy.<sup>90</sup>

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83. Board of Trustees, *Legal Interventions During Pregnancy: Court-Ordered Medical Treatments and Legal Penalties for Potentially Harmful Behavior by Pregnant Women*, 264 JAMA 2663, 2666 (Nov. 28, 1990) [hereinafter *Legal Interventions*] (emphasis added).

84. *Pemberton v. Tallahassee Mem. Reg'l Med. Ctr., Inc.*, 66 F. Supp.2d 1247, 1250 (N.D. Fla. 1999).

85. *Id.* at 1250 n.2. The physicians concluded that without a cesarean section, the viable fetus would die, and that it was “absolutely necessary as a lifesaving procedure to perform a C-Section on the patient.” *Id.* (internal quotation marks omitted). The court determined that, based on “uncontested testimony in the record,” this was an “exaggeration.” *Id.*

86. *Id.* at 1249.

87. *Id.*

88. *Id.* (“[S]he had been unable to hold down food or liquids and was becoming dehydrated. She went with her husband, plaintiff Kent Pemberton, to the emergency room . . . where she requested an IV.”).

89. *Id.*

90. *Pemberton*, 66 F. Supp. 2d at 1249–50.

Shortly thereafter, a judge visited the hospital to conduct an emergency hearing and multiple doctors testified “that vaginal birth would pose a substantial risk of uterine rupture and resulting death of the baby.”<sup>91</sup> After ordering Ms. Pemberton to return to the hospital, the judge continued the hearing in her room and afforded both Ms. Pemberton and her husband an opportunity to express their personal views.<sup>92</sup> At the conclusion of the proceeding, the judge ordered that an emergency cesarean section be performed and Ms. Pemberton delivered a healthy baby boy with no complications.<sup>93</sup>

After the surgery, Ms. Pemberton filed a lawsuit against the hospital alleging various constitutional violations:

She asserts a right to bodily integrity, a right to refuse unwanted medical treatment, and a right to make important personal and family decisions regarding the bearing of children without undue governmental interference. She also invokes her right to religious freedom, although she does not specifically delineate the belief she says was violated or specifically identify its religious mooring.<sup>94</sup>

In granting the hospital’s motion for summary judgment, the district court judge concluded that the compelled medical procedure did not violate Ms. Pemberton’s constitutional rights and eloquently reasoned:

Medicine is not an exact science. The physicians who, on the night at issue, rendered opinions regarding the risk Ms. Pemberton faced from vaginal delivery did not and could not know with certainty whether that risk would be realized in her case. Similarly, the hospital, state attorney and state court who relied on the physicians’ opinions could not know with certainty the outcome Ms. Pemberton would encounter. In anything other than an extraordinary and overwhelming case, the right to decide would surely rest with the mother, not with the state. But based on the evidence disclosed by this record, this was an extraordinary and overwhelming case; no reasonable or even unreasonable argument could be made in favor of vaginal delivery at home with the attendant risk of death to the baby (and concomitant grave risk to the mother). On the clear and uncontradicted evidence, the interests of the baby required a cesarean section.<sup>95</sup>

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91. *Id.* at 1250.

92. *Id.*

93. *Id.*

94. *Id.* at 1251.

95. *Id.* at 1254.

In so ruling, the judge specifically distinguished *In re A.C.*,<sup>96</sup> a momentous en banc decision of the District of Columbia Court of Appeals, in a footnote:

This case is . . . markedly different from *In re A.C.*, in which the court held that a cesarean could not properly be ordered for a terminally ill woman in her 26th week of pregnancy whose death would be hastened by the performance of the proposed cesarean. *In re A.C.* left open the possibility that a non-consenting patient's interest would yield to a more compelling countervailing interest in an "extremely rare and truly exceptional" case. The case at bar is such a case.<sup>97</sup>

These cases represent only two of the many contentious child welfare decisions to unfold in the aftermath of *Roe v. Wade* in which the personal preferences of an expectant mother were weighed against the adverse interests of her unborn child. Thus, there are definitely situations in which the government, acting as *parens patriae*, may properly intervene to protect the life of prenatal children, even when doing so runs counter to the wishes of their parents. When pregnant women are unwilling or unable to properly care for their own, guardian *ad litem* representation is an effective judicial tool to ensure that the needs of prenatal children are considered.

### *C. Legal Prohibitions Against Harming Prenatal Children Outside the Context of Abortion*

There are at least four different categories of cases involving harm to prenatal children: (1) criminal cases in which third parties harm pregnant women; (2) civil actions against third parties who harm pregnant women; (3) civil cases in which pregnant women are accused of harming their own prenatal children, either in a lawsuit to recover damages or in a dependency action to terminate parental rights; and (4) criminal cases in which pregnant women are charged with harming their children before they are born.

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96. 573 A.2d 1235 (D.C. 1990).

97. *Pemberton*, 66 F. Supp. 2d at 1254 n.18 (citations omitted). The circumstances surrounding the case of *In re A.C.* presented the issue of whether cesarean delivery could be court-ordered when the pregnant woman was unconscious, mere hours from death, and her wishes were in doubt. *In re A.C.*, 573 A.2d. at 1237. Sadly, both the prenatal child and the mother died before the case was decided. *Id.* at 1238. Notably, in earlier proceedings, a guardian *ad litem* had been appointed for the prenatal child and the District of Columbia had appeared in a *parens patriae* capacity. *In re A.C.*, 533 A.2d 611, 612 (D.C. 1987), *vacated by In re A.C.*, 539 A.2d 203 (D.C. 1988).

*1. Criminal Prosecution of Third Parties Who Harm Prenatal Children*

Many jurisdictions have passed legislation to increase criminal penalties for violent acts committed against pregnant women.<sup>98</sup> In fact, at least thirty-eight states currently have “feticide” statutes criminalizing the killing of prenatal children outside the context of abortion.<sup>99</sup> In Michigan, for example, Michigan Compiled Laws (MCL) § 750.90a punishes an individual for causing a miscarriage or stillbirth with malicious intent toward the fetus or embryo.<sup>100</sup> Significantly, a violation of this statute is punishable by life imprisonment.<sup>101</sup> Many states have adopted similar provisions by either classifying feticide as a separate crime or defining “person” in their criminal code to include the unborn, although not every homicide statute covers all stages of development.<sup>102</sup> Moreover, some courts have interpreted “person”

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98. *Fetal Homicide Laws*, NAT'L CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/issues-research/health/fetal-homicide-state-laws.aspx> (last updated Feb. 2013).

99. *Id.* (“The states include: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Nebraska, Nevada, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, West Virginia and Wisconsin. At least 23 states have fetal homicide laws that apply to the earliest stages of pregnancy (‘any state of gestation,’ ‘conception,’ ‘fertilization’ or ‘post-fertilization’[.]”) (emphasis omitted); *see also* State v. Merrill, 450 N.W.2d 318, 322 (Minn. 1990) (“[F]etal homicide statutes seek to protect the ‘potentiality of human life,’ and they do so without impinging directly or indirectly on a pregnant woman’s privacy rights.”); Joanne Pedone, *Filling the Void: Model Legislation for Fetal Homicide Crimes*, 43 COLUM. J.L. & SOC. PROBS. 77, 87–88 (2009).

100. MICH. COMP. LAWS ANN. § 750.90a (West 2012) (“If a person intentionally commits conduct proscribed . . . against a pregnant individual, the person is guilty of a felony . . . if all of the following apply: (a) The person intended to cause a miscarriage or stillbirth by that individual or death or great bodily harm to the embryo or fetus, or acted in wanton or willful disregard of the likelihood that the natural tendency of the person’s conduct is to cause a miscarriage or stillbirth or death or great bodily harm to the embryo or fetus. (b) The person’s conduct resulted in a miscarriage or stillbirth by that individual or death to the embryo or fetus.”); *see also id.* § 750.90b (punishing an individual for harming or killing a fetus or embryo during an intentional assault against a pregnant woman without regard to the individual’s intent or recklessness toward the fetus or embryo); *id.* § 750.90c (punishing an individual for harming or killing a fetus or embryo during a grossly negligent act against a pregnant woman without regard to the individual’s state of mind toward the fetus or embryo).

101. *Id.* § 750.90a (West 2012). Michigan passed a constitutional ban on the death penalty in 1963, leaving life imprisonment as the highest form of punishment in the state. *Michigan*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/michigan-0> (last visited Mar. 23, 2013).

102. ALA. CODE § 13A-6-1 (2012); ALASKA STAT. ANN. § 11.41.150 (West 2012); ARIZ. REV. STAT. ANN. § 13-1105(A)(1) (2012); CAL. PENAL CODE § 187(a) (West 2012); FLA. STAT. ANN. § 782.09 (West 2012); GA. CODE ANN. § 16-5-80 (West 2012); IDAHO CODE ANN. § 18-502 (West 2012); 720 ILL. COMP. STAT. ANN. 5/9-1.2 (West 2012); IND. CODE

and “child” in existing legislation to include unborn children.<sup>103</sup> In all, twenty-seven states currently have homicide laws that recognize prenatal children as victims throughout the entire period of prenatal development, and nine additional states have homicide laws that recognize prenatal children as victims during a portion of their development in the womb.<sup>104</sup>

Indeed, there does appear to be a trend in the law to protect non-viable unborn children.<sup>105</sup> In enacting the Fetal Protection Act, for example, the Michigan legislature used the term “embryo” as well as the term “fetus” in describing the prohibited conduct, thereby demonstrating its intent to provide criminal penalties for harm caused to *all* prenatal children.<sup>106</sup> As the Court of Appeals expressly declared in *People v. Kurr*: “The plain language . . . shows the Legislature’s

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ANN. § 35-42-1-6 (West 2012); IOWA CODE ANN. §§ 707.7, 707.8 (West 2012); KY. REV. STAT. ANN. §§ 507A.020 (West 2012); LA. REV. STAT. ANN. § 14:32.5 (2012); MD. CODE ANN., CRIM. LAW § 2-103 (West 2012); MINN. STAT. ANN. § 609.21(1a) (West 2012); MISS. CODE ANN. § 97-3-37 (West 2012); NEB. REV. STAT. ANN. § 28-388 (West 2012); NEV. REV. STAT. ANN. § 200.210 (West 2011); N.Y. PENAL LAW § 125.00 (McKinney 2012); N.D. CENT. CODE ANN. § 12.1-17.1-02 (West 2011); OHIO REV. CODE ANN. § 2903.01 (West 2011); OKLA. STAT. ANN. tit. 21, § 691(B) (West 2012); 18 PA. CONS. STAT. ANN. § 2601 (West 2012); S.C. CODE ANN. § 16-3-1083 (2012); S.D. CODIFIED LAWS § 22-16-1.1 (2011); TENN. CODE ANN. § 39-13-214 (West 2012); UTAH CODE ANN. § 76-5-201 (West 2012); VA. CODE ANN. § 18.2-32.2 (West 2012); W. VA. CODE ANN. § 61-2-30 (West 2011); *see also* ARK. CODE ANN. § 5-13-201(a) (2011) (battery includes harming a fetus); TEX. PENAL CODE ANN. § 19.06 (West 2011) (providing exceptions to the inclusion of unborn children in the homicide provisions); VT. STAT. ANN. tit. 13, § 101 (West 2012) (criminalizing abortions committed by a third party). *But see* COLO. REV. STAT. ANN. § 18-3-101 (West 2012) (defining “person” for purposes of homicide as someone born); HAW. REV. STAT. § 707-700 (West 2012) (defining “person” for purposes of homicide as someone born); OR. REV. STAT. ANN. § 163.005 (West 2012) (defining “human being” as including only those born and alive).

103. *E.g.*, *State v. Ard*, 505 S.E.2d 328, 331 (S.C. 1998) (holding that the words “person” and “child” in South Carolina’s homicide statute applied to viable fetuses both for the purpose of criminal charges and as an aggravating circumstance), *overruled in part on other grounds* by *State v. Shafer*, 531 S.E.2d 524 (S.C. 2000), *as recognized in* *Humphries v. State*, 570 S.E.2d 160, n.8 (S.C. 2002).

104. *State Homicide Laws That Recognize Unborn Victims*, NAT’L RIGHT TO LIFE COMM. (July 5, 2012), [http://www.nrlc.org/Unborn\\_Victims/Statehomicidelaws092302.html](http://www.nrlc.org/Unborn_Victims/Statehomicidelaws092302.html).

105. Strahan, *supra* note 75 (“There is a clear trend to include non-viable unborn children in the interpretation of criminal law and wrongful death statutes.”); *see also* *People v. Davis*, 872 P.2d 591, 599 (Cal. 1994) (In Bank) (holding that the legislature may constitutionally criminalize the murder of a prenatal infant without imposing a viability requirement); *Brinkley v. State*, 322 S.E.2d 49, 51 (Ga. 1984) (upholding a conviction for killing an unborn baby, noting that medical experts do not know a definite time when the movement of an unborn child is possible); *State v. Merrill*, 450 N.W.2d 318, 323 (Minn. 1990) (upholding an indictment for first and second degree murder of a 27 to 28-day-old embryo).

106. *People v. Kurr*, 654 N.W.2d 651, 654 (Mich. Ct. App. 2002) (“Black’s Law Dictionary . . . defines ‘embryo’ as ‘[a] developing but unborn or unhatched animal; esp., an unborn human from conception until the development of organs (i.e., until about the eighth week of pregnancy).’ This definition clearly encompasses non-viable fetuses.” (citations omitted)).

conclusion that fetuses are worthy of protection as living entities as a matter of public policy.”<sup>107</sup> This ruling is of immense importance because it permits a pregnant woman to use deadly force to protect her prenatal child from attack, even if her own life is not in danger.<sup>108</sup>

In that particular criminal case, the defendant, a pregnant woman named Jaclyn Kurr, and her boyfriend were arguing over her cocaine use and he punched her in the stomach two times.<sup>109</sup> Ms. Kurr warned her boyfriend not to hit her because she was pregnant with his babies.<sup>110</sup> When he approached her once again, she stabbed him in the chest.<sup>111</sup> Antonio Pena died as a result of the stab wound and Ms. Kurr was sentenced to serve five to twenty years in prison.<sup>112</sup>

The precise issue on appeal was whether the “defense of others” concept should be extended to protect a prenatal child, viable or non-viable, from an assault on the pregnant woman.<sup>113</sup> The Court of Appeals held that a pregnant woman may use deadly force “if she honestly and reasonably believes the fetus to be in danger of imminent death or great bodily harm” and in so ruling, reasoned:

We emphasize that our decision today is a narrow one. We are obviously aware of the raging debate occurring in this country regarding the point at which a fetus becomes a person entitled to *all* the protections of the state and federal constitutions. This issue, however, is not raised by the parties, is not pertinent to the resolution of the instant case, and does not drive our ruling today. . . . We conclude that an individual may indeed defend a fetus from such an assault and may even use deadly force if she honestly and reasonably believes the fetus to be in danger of imminent death or great bodily harm. *Any other result would be anomalous, given the express policy of this state as declared by the Legislature in the fetal protection act.*<sup>114</sup>

Despite the fact that the appellate court refused to address the issue of whether a prenatal child is a person “entitled to *all* the protections of the state and federal constitutions,”<sup>115</sup> recognition that an unborn

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107. *Id.*

108. *Id.* at 655.

109. *Id.* at 652.

110. *Id.* “[The d]efendant told a Kalamazoo police officer that she had been carrying quadruplets at the time of the stabbing.” *Id.* at 652 n.1.

111. *Id.* at 652.

112. *Kurr*, 654 N.W.2d at 652.

113. *Id.* at 653 (“Defendant now argues that because the trial court did not instruct the jury on the defense of others theory, she was denied her constitutional right to present a defense.”).

114. *Id.* at 657 (second emphasis added).

115. *Id.*



child is a living human being entitled to legal protection is implicit in the *Kurr* decision. After all, the “defense of others” theory does not apply to using deadly force to protect animals or plants.<sup>116</sup>

The most significant, and arguably the most controversial,<sup>117</sup> expansion of rights for prenatal children occurred at the federal level. In 2004, former President George W. Bush signed into law the Unborn Victims of Violence Act (UVVA)<sup>118</sup> which makes it a separate federal offense to kill or injure a “child in utero” while committing certain crimes.<sup>119</sup> The UVVA makes such offenses punishable if the prohibited act harmed the mother but requires no proof that the perpetrator intended to cause harm to the prenatal child or even had knowledge that the mother was pregnant.<sup>120</sup>

However, the UVVA limits its own application such that the government may not prosecute the following individuals: a person for abortion-related conduct to which the mother consented; a person for medical treatment of the mother or child; or a woman with respect to her own child.<sup>121</sup> Notably, the UVVA is the very first federal law to recognize a fertilized egg as a crime “victim,” independent of the pregnant woman who has been harmed.<sup>122</sup> Under the UVVA, “unborn child” is defined as “a child in utero,” which is itself defined as “a member of the species homo sapiens, at any stage of development, who is carried in the womb.”<sup>123</sup> The UVVA prohibits the deliberate murder of such children and penalizes the crime with the same penalty that applies to first-degree murder: “by death or by imprisonment

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116. Patrick Johnston, *Michigan Court Rules Fetus Can Be Defended with Lethal Force*, CHRISTIAN GALLERY NEWS SERV., <http://www.christiangallery.com/justifiablehomicide.htm> (last visited Mar. 23, 2013) (“I cannot employ lethal force against someone who wants to cut my grass without my permission. However, I can employ lethal force against someone who wants to kill my preborn baby without permission.”).

117. See 147 CONG. REC. 6325 (2001) (statement of Rep. Betty McCollum) (urging opposition to the Unborn Victims of Violence Act and alleging that it is part of a concerted campaign to undermine *Roe v. Wade*; that it does not protect women from violence; and that it fails to recognize that injury to a pregnancy is first and foremost an injury to a woman); *Interested Persons Memo on Attempts to Create Fetal Rights: The Unborn Victims 1019, S. 146, H.R. 1997*, ACLU (June 17, 2003) <http://www.aclu.org/reproductive-freedom/interested-persons-memo-attempts-create-fetal-rights-unborn-victims-violence-ac> (“The ACLU fully supports efforts to punish acts of violence against women that harm or terminate a wanted pregnancy. The Unborn Victims of Violence Act is an inappropriate method of imposing such punishment, however, because it dangerously seeks to separate the woman from her fetus in the eyes of the law.”).

118. Pub. L. No. 108-212, 118 Stat. 568 (codified as 18 U.S.C. § 1841 (2006) and 10 U.S.C. § 919a (2006)).

119. 18 U.S.C. § 1841(a)(1).

120. *Id.* § 1841(a)(2).

121. *Id.* § 1841(c).

122. LAW STUDENTS FOR REPROD. JUSTICE, FETAL RIGHTS (2008), available at [http://lsrj.org/documents/factsheets/08-09\\_Fetal\\_Rights.pdf](http://lsrj.org/documents/factsheets/08-09_Fetal_Rights.pdf).

123. 18 U.S.C. § 1841(d).

for life.”<sup>124</sup> The unborn child’s mother is exempted from prosecution, as is any abortionist who has the mother’s consent.<sup>125</sup>

There is no question that this federal legislation has sparked new debate over the issue of when a prenatal child is entitled to legal protection, as well as the implications of such criminal penalties in other areas of law. Those supportive of a prenatal child’s civil rights value the UVVA as recognizing that unborn children are entitled to legal protection.<sup>126</sup> In stark contrast, however, the pro-abortion<sup>127</sup> lobby fiercely opposes the UVVA on the ground that it supposedly elevates the legal status of a prenatal child to that of an adult.<sup>128</sup> But the UVVA has no direct bearing on an expectant mother’s “right to choose.”<sup>129</sup>

124. *Id.* § 1841(a), 1111(b).

125. *Id.* § 1841(c); see also Ken Blackwell, *The 14th Victim at Fort Hood*, AM. THINKER (July 29, 2012), [http://www.americanthinker.com/2012/07/the\\_14th\\_victim\\_at\\_fort\\_hood.html](http://www.americanthinker.com/2012/07/the_14th_victim_at_fort_hood.html) (“Now, I want to focus on something Mr. Obama is *not* doing. He is not charging Nidal Hasan, the accused Fort Hood killer, with violation of the Unborn Victims of Violence Act (UVVA). . . . There would seem to be no possibility of controversy in charging Hasan with violating the UVVA. After all, it is indisputable that one of those killed was pregnant at the time of her death. Nor did the mother, Army Private Francheska Velez, contemplate an abortion. There would be no question of her exercising ‘choice’ in this matter. In fact, her last words, most poignantly reported, were: ‘My baby! my baby!’ It was for just such heinous crimes that the UVVA was passed.”).

126. See Adam C. Kolasinski, Op-Ed., *Untenable Unborn Child Dichotomy*, TECH, Apr. 2, 2004, at 5, available at <http://www-tech.mit.edu/V124/N16/kolasinski.16c.html> (“Predictably, the anti-abortion lobby has come out strongly in favor of the act. The case against abortion rests exclusively on the notion that the unborn child is a human being who deserves the full protection of the law.”).

127. “Pro-abortion” is used here in preference to “abortion-rights” or “pro-choice” or “women’s rights” because the latter are less precise or inaccurate in describing what they purport to describe. See Kolasinski, *supra* note 126, at 5. The “rights” involved are of dubious constitutional basis. Jack M. Balkin, *Abortion and Original Meaning*, YALE L. SCH. FAC. SCHOLARSHIP SERIES (2007), available at [http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1227&context=fss\\_papers](http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1227&context=fss_papers). They do not consider the “rights” of the person whose life is to be taken in an abortion. See Dawn E. Johnsen, *The Creation of Fetal Rights: Conflicts with Women’s Constitutional Rights to Liberty, Privacy, and Equal Protection*, 95 YALE L.J. 599, 599 (1986). The “choice” essential to “pro-choice” rhetoric is the choice to kill the prenatal child, not the choice to have the baby, nor the choice to get pregnant in the first place. See Seth F. Kreimer, Essay, *Does Pro-Choice Mean Pro-Kevoorkian? An Essay on Roe, Casey, and the Right to Die*, 44 AM. U. L. REV. 803, 813 (1995). The rights of women are ignored to the extent that nearly half the babies killed are female. See *Gender Preference in the United States*, INGENDER.COM, <http://in-gender.com/XYU/Gender-Preference> (last visited Mar. 23, 2013) (noting that worldwide, 42% of female fetuses are aborted, compared with 25% of male fetuses).

128. Kolasinski, *supra* note 126, at 5 (“To quote Kate Michelman, president of NARAL, ‘The dangerous reality of the bill . . . is that it would elevate the legal status of the fetus to that of an adult human being.’ She’s actually wrong. The bill would elevate the legal status of an unborn child to that of a baby, but only in certain circumstances. It does not give unborn babies the right to vote or drink.” (citations omitted)).

129. *Id.* (“The act has no direct bearing whatsoever on reproductive freedom, privacy rights, women’s rights, or anything else that abortion rights supporters use to argue their case. It merely grants legal protection to unborn babies in instances where they are attacked against their mother’s will.”).

In arguing against the UVVA, abortion advocates attempt to cloak their underlying premise: that prenatal children deserve no legal protection.<sup>130</sup> Although the UVVA does appear to place prenatal children in a category akin to property, insofar as the “owner” (i.e., the mother) can allow another person to destroy her prenatal child,<sup>131</sup> a third party may only do so with her consent.<sup>132</sup> Helpful, of course, is the fact that the UVVA refers to the victims protected as “children.”<sup>133</sup>

### *2. Civil Penalties for Third Parties Who Harm Prenatal Children*

Courts have generally been receptive to civil law claims by children for harm suffered in utero as the result of negligence by third parties.<sup>134</sup> Every state currently recognizes prenatal harm as a cause of action if the child is subsequently born alive.<sup>135</sup> In Colorado, for example, a district court judge has expressly ruled that a wrongful death action can be maintained for the death of a viable unborn child:

*A full-term, viable unborn child's right to be born alive is entitled to as much protection under the Colorado Wrongful Death Statute as a newborn child's right to live. If, as the result of tortious injury to a mother bearing viable twins, one were born alive with fatal injuries caused by the tortfeasor, but the other was killed before birth, the law should recognize a tort remedy for each death. To the extent that modern medical developments have established that a fetus, once it has attained a certain stage of development is able to survive outside the mother's womb, reasoning based on contrary medical views of earlier times is no longer relevant.*<sup>136</sup>

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130. *Id.* (“In arguing against the unborn victims act, however, the abortion rights lobby cannot avoid exposing the premise underlying their position, which they normally take pains to hide. . . . By fighting this bill so vociferously, abortion rights advocates reveal that the basis of their position is nothing more than the notion that an unborn baby has no rights. . . . [T]heir reluctance to make th[is] notion . . . the centerpiece of their case for abortion indicates that they are afraid to directly confront the public with it. Their fears seem well-founded. As the science of fetology progresses, the humanity of an unborn child becomes more apparent. In an age where a first trimester sonogram is a child's first picture in the family album, I suspect that when forced to confront the question of whether unborn children deserve legal protection, most Americans will answer ‘yes.’”).

131. 18 U.S.C. § 1841(c)(1) (2006).

132. *Id.*

133. *Id.* § 1841.

134. Strahan, *supra* note 75. Strahan also points out that “[a]t common law no recovery for prenatal injury was recognized and this was the law in the United States.” *Id.*

135. See 66 Fed. Credit Union v. Tucker, 853 So. 2d 104, 107 (Miss. 2003) (“Recovery for prenatal injuries when a child is born alive is permitted in every jurisdiction in the country.”).

136. Espadero v. Feld, 649 F. Supp. 1480, 1484 (D. Colo. 1986) (emphasis added).

Similarly, Illinois courts have recognized a prenatal child's "right to be born free from prenatal injuries foreseeably caused by a breach of duty to the child's mother."<sup>137</sup> In one such case, the Supreme Court of Illinois ruled that an infant could maintain a negligence action against a hospital and physician for injuries sustained after the mother was transfused with incompatible blood several years prior to the child's conception.<sup>138</sup> In so holding, the appellate court specifically noted that it would be illogical "to bar relief for an act done prior to conception where the defendant would be liable for this same conduct had the child, unbeknownst to him, been conceived prior to his act."<sup>139</sup>

An appellate court in Texas has even ruled that providing illegal drugs to a pregnant woman "is clear and convincing evidence of conduct endangering the physical well-being of a child" for purposes of terminating a parent-child relationship.<sup>140</sup> In that case, a newborn infant, U.P., was taken into protective custody after she was born addicted to cocaine and barbiturates.<sup>141</sup> Two weeks after U.P.'s birth, her father "was arrested for, and ultimately convicted of, the manufacture and delivery of cocaine."<sup>142</sup> The Texas Department of Protective and Regulatory Services immediately filed a petition to terminate his parental rights and during the trial, a pediatrician testified that U.P. was "likely to suffer from developmental delays, emotional instability, and attention deficit disorder (ADD) for life."<sup>143</sup> U.P.'s father denied supplying crack cocaine to the child's mother after learning of her pregnancy but ultimately conceded that "the actions of U.P.'s mother, combined with his own inaction, placed the child in grave danger."<sup>144</sup>

Despite these and other auspicious rulings across the nation, some courts simply refuse to hear legal claims brought by the unborn on the ground that these particular children are not "persons" under the U.S. Constitution.<sup>145</sup> However, five Justices of the Supreme Court

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137. *Renslow v. Mennonite Hosp.*, 367 N.E.2d 1250, 1255 (Ill. 1977).

138. *Id.* at 1251.

139. *Id.* at 1255.

140. *In re U.P.*, 105 S.W.3d 222, 236 (Tex. Ct. App. 2003).

141. *Id.* at 225 ("During her short life, the child has suffered from numerous medical problems, including intrauterine growth retardation, an umbilical hernia, sleep apnea or Sudden Infant Death Syndrome (SIDS), reflux, reactive airway disease, a crossed eye, and severe developmental delays. She was premature at birth and had below average birth weight. She has undergone surgery without the benefit of anesthetics because of her cocaine addiction.").

142. *Id.* at 226.

143. *Id.* at 225.

144. *Id.* at 226.

145. *See, e.g., Harman v. Daniels*, 525 F. Supp. 798, 798–99 (W.D. Va. 1981) (holding that an infant child has no cause of action under the Civil Rights Act of the Constitution for damage caused in utero by police officer striking mother in the stomach before she was born); *Romero v. Gonzalez Caraballo*, 681 F. Supp. 123, 125–26 (D.P.R. 1988) (refusing to

of Alabama have recently pointed out that personhood in the context of *Roe v. Wade* is not the end of the inquiry:

*Roe's* statement that unborn children are not "persons" within the meaning of the Fourteenth Amendment is irrelevant to the question whether unborn children are "persons" under state law. Because the Fourteenth Amendment "right" recognized in *Roe* is not implicated unless state action violates a woman's "right" to end a pregnancy, the other parts of the superstructure of *Roe*, including the viability standard, are not controlling outside abortion law.<sup>146</sup>

In that particular case, the unanimous Supreme Court of Alabama held that a mother could recover in a wrongful death action against negligent medical doctors for the pre-viability death of her son.<sup>147</sup> In so ruling, the appellate court relied on familiar language from the U.S. Declaration of Independence which is also found in the Alabama Constitution:

[T]he Declaration of Rights in the Alabama Constitution . . . states that "all men are equally free and independent; that they are endowed by their Creator with certain inalienable rights; *that among these are life, liberty and the pursuit of happiness.*" These words . . . affirm that each person has a God-given right to life.<sup>148</sup>

In the special concurrence, the Supreme Court of Alabama also specifically discussed the viability standard established by *Roe v. Wade* in appreciable depth, concluding:

*Roe's* viability rule was based on inaccurate history and was mostly unsupported by legal precedent. Medical advances since *Roe* have conclusively demonstrated that an unborn child is a unique human being at every stage of development. And together, Alabama's homicide statute, the decisions of this Court, and the statutes and judicial decisions from other states make abundantly clear that the law is no longer, in Justice Blackmun's words, "reluctant . . . to accord legal rights to the unborn." For these reasons, *Roe's* viability rule is neither controlling nor persuasive here and should be rejected by other states until the day it is overruled by the United States Supreme Court.<sup>149</sup>

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allow for a claim by a fetus for violations of constitutional rights caused by police brutality and ruling that a fetus is not a person under the Fourteenth Amendment).

146. *Hamilton v. Scott*, 97 So. 3d 728, 741 (Ala. 2012) (Parker, J., Stuart, J., Bolin, J., and Wise, J., concurring specially).

147. *Id.* at 735.

148. *Id.* at 734 n.4 (citations omitted).

149. *Id.* at 747 (Parker, J., Stuart, J., Bolin, J., and Wise, J., concurring specially).

Although many states have retained “viability” as a requirement to recover for the wrongful death of an unborn child,<sup>150</sup> viability as criteria for recovery has been sharply criticized.<sup>151</sup> Indeed, several states have already enacted legislation permitting wrongful death actions prior to viability and numerous courts have upheld such provisions on the ground that *all* children have a right “to begin life with a sound mind and body.”<sup>152</sup>

### *3. Civil Actions Against Mothers Who Harm Their Prenatal Children*

Third parties are not the only defendants who may be subject to civil liability and criminal penalties if a child is harmed in the womb. Several states have enacted statutes which allow a pregnant woman to be deemed negligent if her unborn child tests positive for drugs after birth.<sup>153</sup> Moreover, lawmakers in South Dakota have passed

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150. *E.g.*, *Santana v. Zilog, Inc.*, 95 F.3d 780, 782 (9th Cir. 1996) (holding that Idaho’s wrongful death statute does not apply to non-viable fetuses); *Porter v. Lassiter*, 87 S.E.2d 100, 103 (Ga. Ct. App. 1955) (allowing a wrongful death action for a child who was “quick” in the womb); *Seef v. Sutkan*, 583 N.E.2d 510, 512 (Ill. 1991) (holding that there was a rebuttable presumption that there was a loss of society after the wrongful death of a viable fetus); *66 Fed. Credit Union v. Tucker*, 853 So. 2d 104, 114 (Miss. 2003) (“Following the example of the Supreme Court of Georgia and looking to our own Legislature’s reasoning in this area, we adopt the standard as found in our criminal statute, Miss. Code Ann. § 97-3-3, which will permit recovery for the death of a child that is ‘quick’ in the womb.”).

151. *Strahan*, *supra* note 75.

152. *Womack v. Buchhorn*, 187 N.W.2d 218, 222 (Mich. 1971) (“[J]ustice requires that the principle be recognized that a child has a legal right to begin life with a sound mind and body.” (quoting *Smith v. Brennan*, 157 A.2d 497, 503 (N.J. 1960))); *see, e.g.*, MO. ANN. STAT. § 1.205 (West 2012); OKLA. STAT. ANN. tit. 12, § 1053(F)(1) (West 2012); *Connor v. Monkem Co., Inc.*, 898 S.W.2d 89, 93 (Mo. 1995) (holding that the unborn child was a “person” for purposes of the state wrongful death statute despite the fact that the child was non-viable); *Pino v. United States*, 183 P.3d 1001, 1006 (Okla. 2008) (holding that a wrongful death action could be maintained for a non-viable fetus under Oklahoma law); *Presley v. Newport Hosp.*, 365 A.2d 748, 754 (R.I. 1976) (disregarding the issue of viability for the purpose of determining recovery under Rhode Island’s Wrongful Death Act); *Wiersma v. Maple Leaf Farms*, 543 N.W.2d 787, 791 (S.D. 1996) (holding that a wrongful death action for fetus could be upheld regardless of whether the fetus was viable); *Farley v. Sartin*, 466 S.E.2d 522, 534 (W.Va. 1995) (holding that the term “person,” as used in the wrongful death statutes, includes a non-viable unborn child). *But see*, *Toth v. Goree*, 237 N.W.2d 297, 302 (Mich. Ct. App. 1975) (holding that parents of a fetus not born alive were not able to recover under the wrongful death statute); *LaDu v. Oregon Clinic, P.C.*, 998 P.2d 733, 738 (Or. Ct. App. 2000) (en banc) (holding that Oregon’s wrongful death statute does not apply to non-viable fetuses).

153. ARK. CODE ANN. § 12-18-103(13)(B)(i)(a) (West 2012); COLO. REV. STAT. ANN. § 19-3-102(1)(g) (West 2012); 705 ILL. COMP. STAT. ANN. 405/2-3(1)(c) (West 2012); IND. CODE ANN. § 31-34-1-10(1)(B) (West 2012); IOWA CODE ANN. § 232.68(2)(6) (West 2012); LA. CHILD. CODE ANN. art. 603(22) (2012); MD. CODE ANN., CTS. & JUD. PROC. § 3-818 (West 2012); TEX. FAM. CODE ANN. § 161.001(1)(R) (West 2011); WIS. STAT. ANN. § 48.01(am), (ap) (West 2011).

legislation allowing for pregnant women who abuse drugs or alcohol to be involuntarily committed to a treatment facility.<sup>154</sup> In New Jersey, a private citizen can even petition a judge on behalf of a prenatal child if he or she suspects that the baby is being abused or neglected.<sup>155</sup> In several jurisdictions, medical professionals are specifically required by law to make a report to various government agencies if a newborn infant tests positive for alcohol or drugs.<sup>156</sup>

On the other hand, some states have expressly excluded prenatal children from the definition of a “child” or “juvenile” in need of services.<sup>157</sup> Not surprisingly, however, judicial officers working in states that do not explicitly include or exclude unborn children from their statutes have been wholly inconsistent in resolving the issue of whether a prenatal child qualifies as a “child” for purposes of child protective proceedings.<sup>158</sup> As a result, courts have adopted different

154. S.D. CODIFIED LAWS § 34-20A-63 (2012) (“An intoxicated person who . . . [i]s pregnant and abusing alcohol or drugs[] may be committed to an approved treatment facility for emergency treatment.”).

155. N.J. STAT. ANN. § 30:4C-11 (West 2012) (providing that when it appears that a child’s safety or welfare is endangered, any person or organization having a special interest in the child may petition the State to provide care or custody as the circumstances may require). The provisions of the statute “shall be deemed to include an application on behalf of an unborn child when the prospective mother is within th[e] State at the time of application . . .” *Id.*

156. See ALASKA STAT. ANN. § 47.17.024(a) (West 2012); KY. REV. STAT. ANN. § 214.175 (West 2012); LA. CHILD. CODE ANN. art. 610(G) (2012); MICH. COMP. LAWS ANN. § 722.623a (West 2012); MINN. STAT. ANN. § 626.5561 (West 2012); MONT. CODE ANN. § 41-3-201(3) (2011); N.D. CENT. CODE ANN. § 50-25.1-16(1) (West 2011); OKLA. STAT. ANN. tit. 10A, § 1-2-101(B)(2) (West 2012); VA. CODE ANN. § 63.2-1509(A) (West 2012).

157. See, e.g., ARK. CODE ANN. § 9-27-303(32) (West 2012) (“‘Juvenile’ means an individual who is: (A) From birth to eighteen (18) years of age, whether married or single[.]”); HAW. REV. STAT. ANN. § 587A-4 (West 2012) (“‘Child’ means a person who is born alive and is less than eighteen years of age.”).

158. *In re Nathaniel A.*, 864 A.2d 1066, 1071 (Md. Ct. Spec. App. 2005) (approving a trial court’s classification of an unborn child as a child in need of assistance); *In re Unborn Child*, 683 N.Y.S.2d 366, 370–71 (Fam. Ct. 1998) (holding that unborn children are protected under the Family Court Act and exposing a child to illegal drugs in utero is conduct sufficient to show neglect); *In re Smith*, 492 N.Y.S.2d 331, 335 (Fam. Ct. 1985) (holding that a prenatal child fell within the family court act’s jurisdictional definition of a “person”); *In re Ruiz*, 500 N.E.2d 935, 938 (Ohio Ct. Com. Pl. 1986) (holding that because the child abuse statute included a viable unborn fetus the state has an interest in the child’s well-being at viability); *In re Lacey P.*, 433 S.E.2d 518, 524 n.5 (W. Va. 1993) (stating that an unborn child could be placed in protective custody, which in practice means the State would take custody once the child was born). *But see In re Appeal in Pima Cnty. Juvenile Severance Action No. S-120171*, 905 P.2d 555, 558 (Ariz. Ct. App. 1995) (stating that unborn children are not included in the definition of “child” for purposes of terminating parental rights); *In re Troy D.*, 263 Cal. Rptr. 869, 872 (Ct. App. 1989) (holding that a dependency petition cannot be sustained for a prenatal child); *In re Steven S.*, 178 Cal. Rptr. 525, 528 (Ct. App. 1981) (holding that the legislature did not intend for the term “person” to include an unborn child); *Wixtrom v. Dep’t of Children & Families (In re Guardianship of J.D.S.)*, 864 So. 2d 534, 541 (Fla. Dist. Ct. App. 2004) (“[T]he Legislature has not yet addressed the rights, if any, of the unborn, and when, if at all, a fetus acquires personhood,

approaches to determine whether a mother can be held liable for negligently harming her own unborn child.

It is not uncommon for courts to find that drug abuse by expectant mothers constitutes abuse or neglect under existing child welfare legislation. For example, an appellate court in New York held that a child born with cocaine in his or her system is *prima facie* evidence of neglect, even in the absence of proof that the pregnant woman struggled with drug addiction during pregnancy or was otherwise negligent after her child's birth.<sup>159</sup> In that case, the mother's unfounded reliance on *Roe v. Wade* was summarily rejected.<sup>160</sup> In so ruling, the appellate court discussed why the existing state legislation should be interpreted to protect unborn children:

It has been stated that “[t]he important state interests in preservation of life, the potentiality of life, and child welfare lend resolute support to the argument that child abuse and neglect statutes should include unborn children. In reality, this is the only way to give meaningful effect to those interests. An interest stripped of a method of enforcement is a feckless thing. Nowhere in law are significant state interests unaccompanied by a means of implementation. This is certainly true where the state seeks to prevent death or serious bodily injury. *The only reasonable mechanism to implement state interests in the unborn is through existing abuse and neglect statutes.* Since these statutes can be construed to include the unborn, protection of legitimate state interests calls for such an interpretation. . . . Doing so will nourish important state interests, and extend long overdue legal protection to the unborn.”<sup>161</sup>

A judge in Ohio similarly ruled that a newborn showing drugs in his or her initial toxicology screen is *per se* an abused child.<sup>162</sup> In the relatively recent case of *In re Benjamin M.*, an appellate court in Tennessee interpreted the applicable child abuse statute to afford

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entitling it to the full protections of the law. Whether the Legislature can confer rights on the unborn will be decided by the courts only if, and when, the Legislature enacts such legislation. But in doing so, the Legislature must consider the mother's paramount right to privacy and bodily integrity.”); *Herron v. State*, 729 N.E.2d 1008, 1010 (Ind. Ct. App. 2000) (holding unborn children are not included in the definition of dependent children); *Bay Cnty. Dep't of Soc. Servs. v. Dittrick (In re Dittrick Infant)*, 263 N.W.2d 37, 39 (Mich. Ct. App. 1977) (holding that the legislature did not intend application of the probate code to unborn children); *In re Unborn Child of Starks*, 18 P.3d 342, 348 (Okla. 2001) (holding that unborn children are not included in the definition of “child” in the Oklahoma Children's Code).

159. *In re Stefanel Tyesha C.*, 556 N.Y.S.2d 280, 284 (1990).

160. *Id.* at 285.

161. *Id.* at 285–86 (emphasis added).

162. *In re Baby Boy Blackshear*, 736 N.E.2d 462, 465 (Ohio 2000).



protection to unborn children, observing: "When a child is born alive but injured, the pre-birth timing of the actions is not dispositive."<sup>163</sup> Moreover, an appellate court in Texas has held that evidence of the mother's cocaine use during pregnancy was both legally and factually sufficient to support the trial court's finding that termination of her parental rights was in the child's best interest.<sup>164</sup>

In a much older Michigan case, *In re Baby X*, the initial question before the Court of Appeals was whether a pregnant woman's behavior is relevant to a determination of whether she neglected her living child.<sup>165</sup> In that particular legal controversy, the mother unsuccessfully argued that her prenatal conduct could not constitute neglect or abuse.<sup>166</sup> In holding that a newborn suffering narcotics withdrawal symptoms as a consequence of prenatal maternal drug addiction is a "neglected" child within the jurisdiction of the probate court, the appellate court expressly declared that "[s]ince a child has a legal right to begin life with a sound mind and body, we believe it is within this best interest to examine all prenatal conduct bearing on that right."<sup>167</sup>

In an almost identical case decided in New York, a family court judge upheld a decision of the commissioner of social services to charge a mother with negligence for exposing her prenatal child to cocaine during pregnancy.<sup>168</sup> In so ruling, the judge specifically recognized the prenatal child's right to be born "with a sound mind and body free from parentally inflicted abuse or neglect."<sup>169</sup>

Another significant Michigan case, *In re Dittrick Infant*, involved allegations of ongoing physical and sexual abuse of an unborn child's

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163. *In re Benjamin M.*, 310 S.W.3d 844, 850–51 (Tenn. Ct. App. 2009).

164. *Cervantes-Peterson v. Texas Dep't of Family & Protective Servs.*, 221 S.W.3d 244 (Tex. Ct. App. 2006). *But see In re Steven S.*, 178 Cal. Rptr. 525, 527–28 (Ct. App. 1981) (refusing to apply the juvenile dependency statute to the unborn child of a mentally ill mother); *People ex rel. H.*, 74 P.3d 494, 495 (Colo. App. 2003) (holding that the legislature did not intend to include fetuses in the child protection statute); *In re Valerie D.*, 613 A.2d 748, 756 (Conn. 1992) ("The respondent claims first that § 45a-717(f)(2), properly construed, does not permit the termination of parental rights based upon the prenatal conduct of the mother. We agree."); *In re Guardianship of K.H.O.*, 736 A.2d 1246, 1252–53 (N.J. 1999) ("Drug use during pregnancy, in and of itself, does not constitute a harm to the child under *N.J.S.A.* 30:4C-15.1(a)(1). Prenatal drug use does not, without more, establish parental unfitness or an inability to parent. We emphasize that the purpose of termination is always to effectuate the best interests of the child, not the punishment of the parent. The child is harmed by the mother's drug use, however, when that drug use results in the child being born addicted to drugs with the attendant suffering caused by such addiction." (citations omitted)); *In re Fletcher*, 533 N.Y.S.2d 241, 243–44 (Fam. Ct. 1988) (holding that the mother's occasional drug use during pregnancy, without proof of drug addiction or negligence after the child was born, is insufficient as prima facie evidence of neglect).

165. *In re Baby X*, 293 N.W.2d 736, 738 (Mich. Ct. App. 1980).

166. *Id.*

167. *Id.* at 739 (citations omitted).

168. *In re Fathima Ashanti K.J.*, 558 N.Y.S.2d 447, 448 (Fam. Ct. 1990).

169. *Id.* at 448.

siblings.<sup>170</sup> The probate court assumed jurisdiction over the prenatal child under MCL § 712A.2, which provides in pertinent part:

The court has the following authority and jurisdiction: . . .  
(b) Jurisdiction in proceedings concerning a juvenile under 18 years of age found within the county: . . . (2) Whose home or environment, by reason of neglect, cruelty, drunkenness, criminality, or depravity on the part of a parent, guardian, nonparent adult, or other custodian, is an unfit place for the juvenile to live in.<sup>171</sup>

The Court of Appeals ultimately concluded that the Michigan legislature did not intend application of “these provisions” to prenatal children.<sup>172</sup> At least one court in Michigan has subsequently held that this particular ruling is not dispositive.<sup>173</sup>

In *Dittrick*, the probate court assumed jurisdiction over the prenatal child pursuant to MCL § 712A.2 (b)(2), which addresses the “home environment” of the child.<sup>174</sup> What if the “home environment” in question is a womb? *Dittrick* did not involve a situation in which the life of the prenatal child was in danger.<sup>175</sup> The Bay County Department of Social Services never alleged direct abuse or neglect toward the prenatal child.<sup>176</sup> Although the appellate court in *Dittrick* held that the Department of Social Services and the probate court acted without proper authority under the existing statutes as written, it invited lawmakers to make desirable legislative changes so as to permit action in the best interests of all concerned:

The Legislature may wish to consider appropriate amendments to the Probate Code. Indeed, the background of the present

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170. Bay Cnty. Dep’t Soc. Servs. v. *Dittrick* (*In re Dittrick Infant*), 263 N.W.2d 37, 38 (Mich. Ct. App. 1977).

171. MICH. COMP. LAWS ANN. § 712A.2 (West 2011).

172. *Dittrick*, 263 N.W.2d at 39 (“However, we are persuaded by the defendants’ alternative argument that the probate court did not have jurisdiction to enter the contested order because it could not acquire jurisdiction over an unborn child . . . . However, our reading of other sections of Chapter XIIA of the Probate Code convinces us that the Legislature did not intend application of these provisions to unborn children.”(citations omitted)).

173. The Circuit Court in Calhoun County affirmed an order of the Juvenile Court requiring the mother, over her religious objections, to take insulin injections to preserve the life and health of her unborn child. See DEP’T OF HUMAN SERVS., MICHIGAN CHILD WELFARE LAW MANUAL, CHAPTER 3: JURISDICTION 68 [hereinafter MICHIGAN CHILD WELFARE LAW], available at [http://www.michigan.gov/documents/dhs/MCWLChap3\\_33856\\_7\\_382143\\_7.pdf](http://www.michigan.gov/documents/dhs/MCWLChap3_33856_7_382143_7.pdf) (“*Dittrick* was distinguished in that there were no allegations of direct abuse or neglect toward the fetus itself and no evidence of danger or threat of harm to the unborn child. There was substantial likelihood of harm facing the Wilson Child. . . .”(citing *Jefferson v. Griffin Spalding Hosp. Auth.*, 274 S.E.2d 457 (Ga. 1981)).

174. *Dittrick*, 263 N.W.2d at 39.

175. *Id.* at 38.

176. *Id.*

case has convinced us that such amendments would be desirable. . . . Although the plaintiff Bay County Department of Social Services and the probate court acted without proper authority, we nevertheless believe that their actions were "correct" in the sense that the best interests of all concerned required that the defendants' infant not be left in the defendants' custody.<sup>177</sup>

Indeed, nothing in the *Dittrick* decision prevents a judge from finding that the Michigan legislature intended for the term "child" to include prenatal children.<sup>178</sup> In fact, the Court of Appeals expressly recognized that the word "child" could be interpreted to apply to unborn children.<sup>179</sup>

The highest court in Illinois, however, has refused to allow a cause of action of a child against his or her mother for unintentional injuries sustained in an automobile collision due to the mother's negligent driving.<sup>180</sup> In the case of *Stallman v. Youngquist*, the Illinois Supreme Court refused to subject a pregnant woman to tort liability, reasoning that to do so would require a judicially defined standard of conduct which was neither possible nor justified:

Holding a third person liable for prenatal injuries furthers the interests of both the mother and the subsequently born child and does not interfere with the defendant's right to control his or her own life. Holding a mother liable for the unintentional infliction of prenatal injuries subjects to State scrutiny all the decisions a woman must make in attempting to carry a pregnancy to term, and infringes on her right to privacy and bodily autonomy. . . . It is, after all, the whole life of the pregnant woman which impacts on the development of the fetus. As opposed to the third-party defendant, it is the mother's every waking and sleeping moment which, for better or worse, shapes the prenatal environment which forms the world for the developing fetus. That this is so is not a pregnant woman's fault: it is a fact of life.<sup>181</sup>

Of course, that particular set of circumstances involved a negligent tort as opposed to a pregnant woman's intentional or reckless conduct in a case involving substantiated maternal substance abuse.<sup>182</sup> The

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177. Bay Cnty. Dep't of Soc. Servs. v. *Dittrick* (*In re Dittrick Infant*), 263 N.W.2d 37, 39 (Mich. Ct. App. 1977).

178. *Id.*

179. *Id.* ("We recognize that the word 'child' could be read as applying even to unborn persons.").

180. *Stallman v. Youngquist*, 531 N.E.2d 355, 361 (Ill. 1988).

181. *Id.* at 360.

182. *Id.* at 355-56.

Illinois Supreme Court did not recognize that a prenatal child has rights “hostile to and assertable against its mother” but left intact their prior decision that unborn children have rights in tort against third parties.<sup>183</sup>

#### *4. Criminal Prosecution of Mothers Who Harm Their Prenatal Children*

Another main category of cases involving harm to prenatal children consists of criminal proceedings in which pregnant women are charged with harming their own children before they are born. Many courts over the years have been reluctant to uphold charges against pregnant women for damage done to their unborn children as a result of maternal substance abuse.<sup>184</sup> However, nearly a decade

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183. *Id.* at 360. (“It would be a legal fiction to treat the fetus as a separate legal person with rights hostile to and assertable against its mother. . . . No other defendant must go through biological changes of the most profound type, possibly at the risk of her own life, in order to bring forth an adversary into the world.”).

184. *See, e.g.*, *Reyes v. Superior Court of San Bernardino Cnty.*, 141 Cal. Rptr. 912, 913 (Ct. App. 1977) (holding that “child” in the California child abuse and neglect statute did not apply to unborn children); *Johnson v. State*, 602 So. 2d 1288, 1294 (Fla. 1992) (holding that the term “delivery” in statute criminalizing distribution of controlled substances to an infant did not apply to woman who delivered drugs to her child either before birth or after birth but before the umbilical cord was cut); *State v. Gethers*, 585 So. 2d 1140, 1142 (Fla. Dist. Ct. App. 1991) (holding that the legislature considered and explicitly rejected criminal penalties against mothers for exposing their children to drugs in utero); *State v. Luster*, 419 S.E.2d 32, 34 (Ga. Ct. App. 1992) (holding that the term “deliver” in Georgia’s drug delivery statute did not apply to a mother who passed drugs to her unborn child in utero); *Commonwealth v. Welch*, 864 S.W.2d 280, 284 (Ky. 1993) (holding that Kentucky’s criminal abuse statute did not apply to unborn children because the word “person” in the statute did not apply to unborn children); *Cochran v. Commonwealth*, 315 S.W.3d 325, 327 (Ky. 2010) (citing *Commonwealth v. Welch* to again hold that Kentucky’s criminal abuse statute did not apply to a woman’s conduct during pregnancy); *State v. Armstard*, 991 So. 2d 116, 126 (La. Ct. App. 2008) (holding that Louisiana’s cruelty to juveniles statute did not apply to a mother who transmitted illegal substances to her child through the umbilical cord after birth); *People v. Hardy*, 469 N.W.2d 50, 53 (Mich. Ct. App. 1991) (“[T]his Court is not at liberty to create a crime. We are not persuaded that a pregnant woman’s use of cocaine, which might result in the postpartum transfer of cocaine metabolites through the umbilical cord to her infant, is the type of conduct that the Legislature intended to be prosecuted under the *delivery-of-cocaine* statute, thereby subjecting the woman to the possibility of up to twenty years in prison and a fine of \$ 25,000. This, in our opinion, would not be a reasonable construction of the statute.”); *State v. Wade*, 232 S.W.3d 663, 666 (Mo. Ct. App. 2007) (holding that Mo. Rev. Stat. § 1.205.4 explicitly precluded criminal child endangerment charges against a mother for harming her prenatal child through the use of illicit substances during pregnancy); *Sheriff v. Encoe*, 885 P.2d 596, 597 (Nev. 1994) (woman transmitting cocaine to child born through umbilical cord before cut was not criminally liable); *State v. Gray*, 62 Ohio St. 3d 514 (1992) (holding that Ohio’s child endangerment statute didn’t apply to a woman who used drugs while pregnant); *State v. Deborah J.Z.*, 596 N.W.2d 490, 493 (Wis. Ct. App. 1999) (refusing to uphold charging a woman with attempted first-degree homicide and reckless injury when she drank heavily during pregnancy in an

ago, the highest court in South Carolina upheld the homicide by child abuse conviction of a woman who gave birth to a stillborn child after using cocaine during her pregnancy.<sup>185</sup> In so ruling, the Supreme Court of South Carolina interpreted the applicable homicide statute<sup>186</sup> to encompass a mother who acts with “extreme indifference to human life” by using cocaine when she knows that she is pregnant.<sup>187</sup> This particular decision hinged largely upon the previous appellate ruling in *Whitner v. State*, a landmark case in which a prenatal child was deemed to be a “person” for purposes of the Children’s Code.<sup>188</sup>

In 1992, Cornelia Whitner pled guilty to criminal child neglect after her baby was born with cocaine metabolites in its system and was sentenced to serve eight years in prison.<sup>189</sup> Ms. Whitner thereafter filed a petition for post-conviction relief alleging ineffective assistance of counsel on the ground that her defense attorney failed to inform her that the statute under which she was being prosecuted might not apply to prenatal drug use.<sup>190</sup> In affirming Ms. Whitner’s conviction, the Supreme Court of South Carolina swiftly rejected her argument that prosecuting a pregnant woman for using crack cocaine “unconstitutionally burdens” her right to privacy:

*It strains belief for Whitner to argue that using crack cocaine during pregnancy is encompassed within the constitutionally recognized right of privacy. Use of crack cocaine is illegal, period. No one here argues that laws criminalizing the use of crack cocaine are themselves unconstitutional. If the State wishes to impose additional criminal penalties on pregnant women who engage in this already illegal conduct because of the effect the conduct has on the viable fetus, it may do so. We do not see how the fact of*

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attempt to kill her child because the court interpreted the statute only to apply to people born alive).

185. *State v. McKnight*, 576 S.E.2d 168 (S.C. 2003).

186. S.C. CODE ANN. § 16-3-85(A) provides in relevant part: “(A) A person is guilty of homicide by child abuse if the person: (1) causes the death of a child under the age of eleven while committing child abuse or neglect, and the death occurs under circumstances manifesting an extreme indifference to human life[.]”

187. *McKnight*, 576 S.E. 2d at 172–73 (quoting S.C. CODE ANN. § 16-3-85(A) (West 1976)).

188. *Whitner v. State*, 492 S.E.2d 777, 780 (S.C. 1995) (“Similarly, we do not see any rational basis for finding a viable fetus is not a ‘person’ in the present context. Indeed, it would be absurd to recognize the viable fetus as a person for purposes of homicide laws and wrongful death statutes but not for purposes of statutes proscribing child abuse. Our holding in *Hall* that a viable fetus is a person rested primarily on the plain meaning of the word ‘person’ in light of existing medical knowledge concerning fetal development. We do not believe that the plain and ordinary meaning of the word ‘person’ has changed in any way that would now deny viable fetuses status as persons.”).

189. *Id.* at 778–79.

190. *Id.* at 780.

pregnancy elevates the use of crack cocaine to the lofty status of a fundamental right.<sup>191</sup>

### III. THE NECESSITY AND PROPRIETY OF APPOINTING GUARDIANS *AD LITEM* FOR PRENATAL CHILDREN

#### *A. Kermit Gosnell: A Case Study for the Necessity of Appointing Guardians Ad Litem for Prenatal Children*

The infamous and ongoing case<sup>192</sup> of Dr. Kermit Gosnell provides a perfect illustration of the dire need for unborn children to enjoy expanded legal protection. The gruesome story of his illegal abortion practice peppered the news media and demonstrates precisely why effective oversight, even in the context of abortion, is so necessary.

Kermit Gosnell immediately received national media attention when he was charged with eight counts of murder: seven charges stemming from the deaths of prenatal children whom he delivered alive and then stabbed to death, and one for a young woman, Karnamaya Mongar, who died after his unlicensed staff administered a lethal dose of Demerol at his direction.<sup>193</sup> During the course of the investigation it was discovered that Dr. Gosnell was routinely performing illegal third-trimester abortions, and that he also committed murder on numerous occasions by inserting scissors into the spinal

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191. *Id.* at 786 (emphasis added).

192. See Joseph A. Slobodzian, *Update: Kermit Gosnell Makes an Appearance*, INQUIRER (Apr. 26, 2012, 4:25 PM), [http://www.philly.com/philly/blogs/crime\\_and\\_punishment/149123753.html](http://www.philly.com/philly/blogs/crime_and_punishment/149123753.html) ("It's been 15 months since Dr. Kermit B. Gosnell was accused of murder and related charges by the Philadelphia District Attorney's office for performing illegal late-term abortions at his West Philadelphia women's clinic. It's been almost that long since he was last seen in court. . . . The clinic and Gosnell became the subject of an investigation by a Philadelphia County grand jury and in January 2011 Gosnell and nine employees were charged by the District Attorney's office. Gosnell faces the most serious charges including third-degree murder in the 2009 death of a Virginia woman undergoing an abortion and seven counts of first-degree murder in the deaths of seven infants who were allegedly born live and viable but then killed by Gosnell, who snipped their spinal cords with scissors. Gosnell faces the death penalty if a jury finds him guilty of the first-degree murder charges. But as with the federal trial, Gosnell will spend months more behind bars before he gets his day in court in the state case. The trial has been set for next March 14 before Philadelphia Common Pleas Court Judge Jeffrey P. Minehart. Two former clinic employees will be tried with Gosnell. The remaining seven who were charged, including Gosnell's wife, Pearl, 51, have pleaded guilty but will not be sentenced until after Gosnell's trial is over.").

193. See Jessica Hopper, *Alleged Victim Calls Philadelphia Abortion Doc Kermit Gosnell a 'Monster'*, ABCNEWS.COM (Jan. 25, 2011), <http://abcnews.go.com/US/alleged-victim-calls-philadelphia-abortion-doctor-kermit-gosnell/story?id=12731387>; Sabrina Tavernise, *Squalid Abortion Clinic Escaped State Oversight*, N.Y. TIMES (Jan. 22, 2011), [http://www.nytimes.com/2011/01/23/us/23doctor.html?\\_r=1](http://www.nytimes.com/2011/01/23/us/23doctor.html?_r=1); Elizabeth Wong, *Pa. Doctor Could Face Death Penalty*, WASH. TIMES (Mar. 2, 2011), <http://www.washingtontimes.com/news/2011/mar/2/prosecutors-seeking-death-pa-abortion-doctor/>.

columns of newborn infants and severing their spinal cord, a procedure which most definitely caused the children to suffer excruciating pain before they died.<sup>194</sup>

For over sixteen years Gosnell's "Women's Medical Society" located in Philadelphia went completely unregulated and uninspected, despite numerous complaints made to the Philadelphia Department of Health.<sup>195</sup> Additionally, the Philadelphia Department of State, an agency that is specifically charged with overseeing medical licenses, failed to investigate Kermit Gosnell personally even after government officials became aware that he was involved in two lawsuits, one of which stemmed from the death of his patient after he perforated her uterus.<sup>196</sup>

Even after being informed of Karnamaya Mongar's death, neither the Department of Health nor the Department of State bothered to follow up on Gosnell's practice.<sup>197</sup> In fact, it was only after Federal Bureau of Investigation and Drug Enforcement Administration agents raided his clinic to investigate suspected illegal drug activity that the nature of Gosnell's "medical practice" became public, and local government agencies finally shut down his clinic.<sup>198</sup>

During the raid, government officials found the grisly remains of numerous prenatal children being stored in various bags, orange juice jugs, and cat food containers located inside of freezers concealed in the clinic's basement.<sup>199</sup> Some of the remains were clearly past the statutory limit for legal abortions in Pennsylvania.<sup>200</sup> At least two were viable, and several others provided evidence of Gosnell's practice of severing the spinal cord of newborn infants with scissors.<sup>201</sup> Despite the fact that "Pennsylvania law requires physicians to provide customary care for living babies outside the womb[,] Gosnell chose instead to slit their necks and store their bodies in various household containers, as if they were trash."<sup>202</sup>

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194. Report of the Grand Jury at 1, 4, 104, *In re* County Investigating Grand Jury XXIII (Pa. Ct. Com. Pl. 2011) (Misc. No. 0009901-2008) [hereinafter Report of the Grand Jury].

195. *Id.* at 216.

196. *Id.* at 10–11.

197. *Id.* at 10.

198. *Id.* at 8 ("Pennsylvania is not a third-world country. There were several oversight agencies that stumbled upon and should have shut down Kermit Gosnell long ago. But none of them did, not even after Karnamaya Mongar's death. In the end, Gosnell was only caught by accident, when police raided his offices to seize evidence of his illegal prescription selling. Once law enforcement agents went in, they couldn't help noticing the disgusting conditions, the dazed patients, the discarded fetuses. That is why the complete regulatory collapse that occurred here is so inexcusable. It should have taken only one look.").

199. *Id.* at 21.

200. Report of the Grand Jury, *supra* note 194, at 21.

201. *Id.*

202. *Id.* at 107–08.

These prenatal children and newborn infants, not to mention the women harmed and murdered by Kermit Gosnell, deserved far better protection from the government than the utter disregard they received. As the grand jurors who indicted Gosnell reported so eloquently:

[N]ot all women seeking abortion find their way to . . . high-quality facilities; some end up in a filthy, dangerous clinic such as Gosnell's. There the patients have to depend on DOH oversight to protect them—as do babies born alive, and helpless but viable fetuses after 24 weeks of gestation. Yet no protection is forthcoming.<sup>203</sup>

Indeed, when asked about the Department of Health's utter failure to investigate Gosnell's illegal and dangerous practices, the agency's chief counsel simply stated that "[p]eople die."<sup>204</sup> This incredibly callous remark demonstrates the fact that relying on government oversight alone is inadequate, and that persons outside the government must be empowered to protect unborn children from illegal abortion, or born children from vicious murder, when government officials refuse to enforce laws that are specifically designed to protect children. A logical answer is the judicial system, through the swift appointment of a guardian *ad litem* for any unborn child suspected of being a victim of maternal substance abuse or in peril of being illegally aborted.

Simply stated, the procedural mechanism for protecting these prenatal children would closely resemble that of existing reporting processes for born children who are believed to be suffering from abuse or neglect: a family member, friend, or neighbor discovers that a particular woman is going to have an illegal third-trimester abortion, or that she is using illegal drugs or abusing alcohol in a way that objectively poses substantial risk of harm to her unborn child.

Pursuant to a guardian *ad litem* statute, like the model law proposed in the final section of this article, the concerned citizen would be free to petition the government to immediately appoint an advocate to protect the unborn child from preventable harm. As an officer of the court, the guardian *ad litem* could in turn obtain an emergency order preventing the pregnant woman from illegally aborting her child, enjoining an abortionist from performing an unlawful medical procedure, or even requiring a known drug addict to be involuntarily committed for the duration of her pregnancy. Since existing abortion restrictions in the pregnant woman's jurisdiction have already been

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203. *Id.* at 138.

204. *Id.* at 15.



deemed constitutional, *Roe v. Wade* would be irrelevant to the appointment of a guardian *ad litem* for the sole purpose of advocating for the best interests of the child.

In addition to preventing illegal late-term abortions, guardian *ad litem* representation for prenatal children would also publicly expose criminal abortion providers who are collecting thousands of dollars from despairing women,<sup>205</sup> thereby encouraging the essential government inspection that was so egregiously lacking in the case of Kermit Gosnell. The appointment of a guardian *ad litem* on the motion of a person with firsthand knowledge that illegal killings were occurring would ideally inspire swift judicial intervention, particularly in cases where state officials have failed to act. Moreover, the public nature of these court injunctions would also create an incentive for the government to properly fulfill its role as child protector in cases involving patent violations of state abortion laws.

In addition to furthering the societal interest in preventing illegal abortions, guardian *ad litem* representation is also a reasonable method to protect unborn children from becoming victims of infanticide. Failure to provide medical care for a child born alive during an abortion procedure is specifically prohibited in twenty-six states, including Pennsylvania.<sup>206</sup> Even so, it is simply not feasible for an infant, newborn or prenatal, who is mere minutes away from having a pair

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205. Patrick Walters & Maryclaire Dale, *DA: West Philadelphia Abortion Doctor Killed 7 Babies with Scissors*, ASSOCIATED PRESS, Jan. 21, 2011, <http://abclocal.go.com/wpvi/story?section=news/local&id=7906881> (“Gosnell didn’t advertise, but word got around. Women came from across the city, state and region for illegal late-term abortions, authorities said. They paid \$325 for first-trimester abortions and \$1,600 to \$3,000 for abortions up to 30 weeks. The clinic took in \$10,000 to \$15,000 a day, authorities said. ‘People knew near and far that if you needed a late-term abortion you could go see Dr. Gosnell,’ [District Attorney Seth] Williams said. White women from the suburbs were ushered into a separate, slightly cleaner area because Gosnell believed they were more likely to file complaints, Williams said. . . . Assistant District Attorney Joanne Pescatore said: ‘He does not know how to do an abortion. Once he got them there, he saw dollar signs and did abortions that other people wouldn’t do.’”).

206. ARIZ. REV. STAT. ANN. § 36-2301 (2012); CAL. HEALTH & SAFETY CODE § 123435 (West 2012); CONN. GEN. STAT. §§ 19a-602, 19-13-D54(g) (2012); DEL. CODE ANN. tit. 24, § 1795 (West 2012); FLA. STAT. ANN. § 39.807 (West 2012); IND. CODE ANN. § 16-34-2-3 (West 2012); IOWA CODE ANN. §§ 707.9–10 (West 2012); LA. REV. STAT. ANN. § 14:87.5 (2012); ME. REV. STAT. tit. 22, § 1594 (2011); MASS. GEN. LAWS ANN. ch. 112, § 12P (West 2012); MICH. COMP. LAWS ANN. § 333.1073 (West 2012); MINN. STAT. ANN. § 145.415 (West 2012); MO. ANN. STAT. § 565.300 (West 2012); MONT. CODE ANN. § 50-20-108 (West 2011); NEB. REV. STAT. ANN. § 28-331 (West 2012); NEV. REV. STAT. ANN. § 442.270 (West 2011); N.Y. PUB. HEALTH LAW § 4164 (McKinney 2012); N.D. CENT. CODE ANN. §§ 14-02.1-05 to -08 (West 2011); OHIO REV. CODE ANN. §§ 2919.13, 2919.17(e) (West 2012); OKLA. STAT. ANN. tit. 63, § 1-734 (West 2012); 18 PA. CONS. STAT. ANN. § 3212 (West 2012); R.I. GEN. LAWS ANN. § 11-9-18 (West 2012); S.D. CODIFIED LAWS § 34-23A-16.1 (2012); TENN. CODE ANN. § 39-15-206 (West 2012); WASH. REV. CODE ANN. § 18.71.240 (West 2012); WYO. STAT. ANN. § 35-6-103–104 (West 2012).

of scissors plunged into his or her neck to obtain legal representation fast enough, even if there was someone aware of the child's plight and motivated to seek help. The newborn baby would certainly be dead before any such representation could be ordered. Thus, the only way to effectively prevent the reoccurrence of a heartbreaking scandal like Kermit Gosnell's "House of Horrors" is to reform existing child welfare legislation to specifically enable concerned citizens to file petitions to appoint child advocates for unborn children *before* their mothers walk through the door of an illegal abortion clinic.

It is also important to note that in addition to performing illegal late-term abortions and infanticide, Kermit Gosnell violated numerous other abortion clinic licensing standards, informed consent and parental consent laws. In this area, guardian *ad litem* representation for a prenatal child in danger of being illegally aborted might also bring to light violations of other laws designed to ensure the health and safety of women seeking abortions.

### *B. Current Abortion Restrictions Throughout the United States*

In addition to trimester restrictions and bans on partial-birth abortions,<sup>207</sup> most jurisdictions have enacted a broad spectrum of additional abortion laws, including informed consent procedures, parental consent requirements, mandatory waiting periods, restrictions on who may perform abortions, and reporting requirements for abortion providers. Currently, forty-four states, as well as the territories of Guam and the Virgin Islands, have statutory limits on abortion.<sup>208</sup>

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207. *Partial-Birth Abortion Q & A*, NAT'L RIGHT TO LIFE, <http://www.nrlc.org/abortion/facts/pbafacts.html> (last visited Mar. 23, 2013) ("Partial-Birth Abortion is a procedure in which the abortionist pulls a *living baby* feet-first out of the womb and into the birth canal (vagina), except for the head, which the abortionist purposely keeps lodged just inside the cervix (the opening to the womb). The abortionist punctures the base of the baby's skull with a surgical instrument, such as a long surgical scissors or a pointed hollow metal tube called a trochar. He then inserts a catheter (tube) into the wound, and removes the baby's brain with a powerful suction machine. This causes the skull to collapse, after which the abortionist completes the delivery of the now-dead baby. . . . According to Ron Fitzsimmons, executive director of the National Coalition of Abortion Providers (1997), and other sources, it appears that partial-birth abortions are performed 3,000 to 5,000 times annually.").

208. ALA. CODE § 26-22-3 (2012); ALASKA STAT. ANN. § 18.16.050 (West 2012); ARIZ. REV. STAT. ANN. § 13-3603.01 (2012); ARK. CODE ANN. § 20-16-1203 (West 2012); CAL. HEALTH & SAFETY CODE § 123468 (West 2012); CONN. GEN. STAT. ANN. § 19a-602 (West 2012); DEL. CODE ANN. tit. 24, § 1790(b)(1) (West 2012); FLA. STAT. ANN. §§ 390.0111, 782.34 (West 2012); GA. CODE ANN. §§ 16-12-141(c) to -144 (West 2012); GA. COMP. R. & REGS. R. 290-5-32-.02 (2012); 10 GUAM CODE ANN. §§ 91A101–91A111 (2011); 9 GUAM CODE ANN. § 31.20–.21 (2011); HAW. REV. STAT. § 453-16(b) (West 2012); IDAHO CODE ANN. §§ 18-608-613 (West 2012); 720 ILL. COMP. STAT. ANN. 513/10 (West 2012); IND. CODE ANN. § 16-34-2-1 (West 2012); IOWA CODE ANN. §§ 707.7, 707.8A (West 2012); KAN. STAT. ANN. §§ 65-6703

These laws typically ban partial-birth procedures or prohibit abortion after a certain gestational age, or both.<sup>209</sup> Thus, there are already vast legal limits on a pregnant woman's so-called right to kill her unborn child, which, taken together, affirm that every prenatal child has a right to life and health.

Of course, the vast majority of abortion statutes also contain exceptions to protect the life and health of the mother.<sup>210</sup> In deciding whether a true and adequate "health exception" applies to a particular set of circumstances, courts would do well to balance any purported life or health allegations as to the mother against the certain lethal consequences of abortion to her unborn child. The meaning of "health" for purposes of these statutes varies widely, if defined at all, to encompass concepts as disparate as the expansive "mental health"<sup>211</sup> label at one end of the spectrum to the more defined and limited concept of substantial and irreversible impairment of major bodily functions at the other.<sup>212</sup> Several states require the physician performing the abortion to file a report describing the precise medical condition giving rise to the need for the procedure, and some jurisdictions even require a second physician to verify that the abortion is, in fact, necessary to preserve the pregnant woman's health.<sup>213</sup>

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to -6721 (West 2012); KY. REV. STAT. ANN. §§ 311.760-780 (West 2012); LA. REV. STAT. ANN. §§ 14:32.10-11, 14:87-87.1, -87.5 (2012); ME. REV. STAT. ANN. tit. 22, § 1598 (2011); MASS. GEN. LAWS ANN. ch. 112, §§ 12M-12Q (West 2012); MICH. COMP. LAWS ANN. § 333.17516 (West 2012); MINN. STAT. ANN. § 145.412 (West 2012); MISS. CODE ANN. § 41-41-73 (West 2012); MO. ANN. STAT. § 188.030 (West 2012); MONT. CODE ANN. § 50-20-109 (West 2011); NEB. REV. STAT. ANN. § 28-328 to -330 (West 2012); NEV. REV. STAT. ANN. § 442.250 (West 2011); N.J. STAT. ANN. § 2A:65A-6 (West 2012); N.M. STAT. ANN. § 30-5A-3 (West 2012); N.Y. PENAL LAW § 125.05 (McKinney 2012); N.C. GEN. STAT. ANN. § 14-44 to -45.1 (West 2012); N.D. CENT. CODE ANN. §§ 14-02.6-02 to 6-03, 14-02.1-04 (West 2011); OHIO REV. CODE ANN. §§ 2919.151, .17 (West 2011); OKLA. STAT. ANN. tit. 21, § 684, tit. 63, § 1-732 (West 2012); 18 PA. CONS. STAT. ANN. § 3211 (West 2012); R.I. GEN. LAWS ANN. §§ 23-4.12-2 to -3, 11-23-5 (West 2012); S.C. CODE ANN. §§ 44-41-20, -85 (2012); S.D. CODIFIED LAWS §§ 34-23A-5 to -27 (2012); TENN. CODE ANN. §§ 39-15-201 to -209 (West 2012); TEX. HEALTH & SAFETY CODE ANN. § 170.002 (West 2011); UTAH CODE ANN. §§ 76-7-302, -307 to 308.5, 310.5, 314.5, 326 (West 2012); VA. CODE ANN. §§ 18.2-71.1, -74 (West 2012); V.I. CODE ANN. tit. 14, § 151 (2012); W. VA. CODE ANN. § 33-42-8 (West 2012); WIS. STAT. ANN. §§ 940.04, .15-.16 (West 2012); WYO. STAT. ANN. § 35-6-102 (West 2012).

209. See sources cited *supra* note 208.

210. See sources cited *supra* note 208.

211. DEL. CODE ANN. tit. 24, § 1790 (West 2012); MASS. GEN. LAWS ANN. ch. 112, § 12M (West 2012); N.D. CENT. CODE ANN. § 14-02.1-04(3) (West 2012); OKLA. STAT. ANN. tit. 63, § 1-730(8) (West 2012); S.C. CODE ANN. § 44-41-20(c) (2012); TEX. HEALTH & SAFETY CODE § 170.002(b)(2) (West 2011).

212. ALA. CODE § 26-22-3 (2012); IND. CODE ANN. § 16-34-2-1(3)(C) (West 2012); KAN. STAT. ANN. § 65-6703(a) (West 2012); MONT. CODE ANN. § 50-20-109(4) (West 2011); OHIO REV. CODE ANN. § 2919.17(A)(1) (West 2011); 18 PA. CONS. STAT. ANN. § 3211(b)(1) (West 2012); UTAH CODE ANN. § 76-7-302(3)(b)(1)(B) (West 2012).

213. ALA. CODE § 26-22-3 (2012); ARIZ. REV. STAT. ANN. § 36-2301.01(A)(1) (2012); ARK. CODE ANN. § 20-16-705(b) (West 2012); DEL. CODE ANN. tit. 24, § 1790(a)(1), (4) (West

At the time of this writing, thirty-five states have valid informed consent laws requiring abortion providers to inform women of the health risks of abortion, the probable gestational age and development of her prenatal child, abortion alternatives, and any government assistance available should she choose to carry her baby to full term.<sup>214</sup> In addition, most states with informed consent laws require that these materials be provided to the pregnant woman in advance, usually at least a day or two before the abortion appointment, so she has time to review all of the information and consider her options.<sup>215</sup>

Along with informed consent laws, forty states also have valid parental consent laws requiring minors to obtain at least one parent's

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2012); 720 ILL. COMP. STAT. ANN. 510/5 (West 2012); IND. CODE ANN. § 16-34-2-1(1)(B), (3)(C) (West 2012); KAN. STAT. ANN. § 65-6703(a) (West 2012); LA. REV. STAT. ANN. § 40:1299.35.4(A) (2012); MINN. STAT. ANN. § 145.412(3)(2) (West 2012); MO. ANN. STAT. § 188.030(1) (West 2012); MONT. CODE ANN. § 50-20-109(2) to (3) (West 2011); NEV. REV. STAT. ANN. § 442.250(1)(C) (West 2011); OHIO REV. CODE ANN. § 2919.17(B)(1) (West 2011); OKLA. STAT. ANN. tit. 63, § 1-732(A), (C) (West 2012); 18 PA. CONS. STAT. ANN. § 3211(c)(1)–(2) (West 2012); TEX. HEALTH & SAFETY CODE ANN. § 170.002(c) (West 2012); VA. CODE ANN. § 18.2-74(b) (West 2012).

214. ALA. CODE §§ 26-23A-1–13 (2012); ALASKA STAT. ANN. § 18.16.060 (West 2012); ARIZ. REV. STAT. § 36-2153 (2012); ARK. CODE ANN. §§ 20-16-602, -901 to -908 (West 2012); CAL. CODE REGS. tit. 22, § 75040 (2012); CONN. AGENCIES REGS. § 19a-116-1 (2012); DEL. CODE ANN. tit. 24, § 1794 (West 2012); FLA. STAT. ANN. § 390.0111(3) (West 2012); GA. CODE ANN. §§ 31-9A-1–8 (West 2012); IDAHO CODE ANN. § 18-609 (West 2012); IND. CODE ANN. § 16-34-2-1.1 (West 2012); KAN. STAT. ANN. §§ 65-6708–6715 (West 2012); KY. REV. STAT. ANN. § 311.725 (West 2012); 902 KY. ADMIN. REGS. 4:110 (2012); LA. REV. STAT. ANN. § 40:1299.35.6 (2012); ME. REV. STAT. ANN. tit. 22, § 1599-A (2011); MASS. GEN. LAWS ANN. ch.112, § 12S (West 2012); MICH. COMP. LAWS ANN. § 333.17015 (West 2012); MINN. STAT. ANN. § 145.4242 (West 2012); MISS. CODE ANN. §§ 41-41-33 to -34 (West 2012); MO. ANN. STAT. § 188.027 (West 2012); MONT. CODE ANN. § 50-20-106 (West 2011); NEB. REV. STAT. ANN. § 28-327 (West 2012); NEV. REV. STAT. ANN. §§ 442.252–253 (West 2011); N.D. CENT. CODE ANN. §§ 14-02.1-02(6), -03(1), -04(4) (West 2011); OHIO REV. CODE ANN. §§ 2317.56, 2919.12(A) (West 2011); OKLA. STAT. ANN. tit. 63, §§ 1-738.1A to 738.16 (West 2012); 18 PA. CONS. STAT. ANN. § 3205 (West 2012); R.I. GEN. LAWS ANN. §§ 23-4.7-2 to .7-5 (West 2012); S.C. CODE ANN. § 44-41-330 (2012); S.D. CODIFIED LAWS §§ 34-23A-10.1 to -10.4, -52 (2012); TEX. HEALTH & SAFETY CODE ANN. §§ 171.011 to .018 (West 2011); UTAH CODE ANN. §§ 76-7-305 to -305.7 (West 2012); VA. CODE ANN. § 18.2-76 (West 2012); W. VA. CODE ANN. §§ 16-2I-1 to -8 (West 2012); WIS. STAT. ANN. § 253.10 (West 2011).

215. ALA. CODE § 26-23A-4 (2012); ARIZ. REV. STAT. § 36-2153 (2012); ARK. CODE ANN. § 20-16-903(b)(1)(A) (West 2012); GA. CODE ANN. § 31-9A-3 (West 2012); IDAHO CODE ANN. § 18-609(4) (West 2012); IND. CODE ANN. § 16-34-2-1.1(a)(1) (West 2012); KAN. STAT. ANN. § 65-6709 (West 2012); KY. REV. STAT. ANN. § 311.725(1)(a) (West 2012); LA. REV. STAT. ANN. § 40:1299.35.6(B)(1) (2012); MICH. COMP. LAWS ANN. § 333.17015(3) (West 2012); MINN. STAT. ANN. § 145.4242(a)(1) (West 2012); MISS. CODE ANN. § 41-41-33(1)(a) (West 2012); MO. ANN. STAT. §§ 188.027(1), .039 (West 2012); MONT. CODE ANN. § 50-20-106(1) (West 2011); N.D. CENT. CODE ANN. § 14-02.1-02(6)(a) (West 2011); OHIO REV. CODE ANN. § 2317.56(B) (West 2011); OKLA. STAT. ANN. tit. 63, § 1-738.2(B)(1)(a) (West 2012); 18 PA. CONS. STAT. ANN. § 3205(a)(1) (West 2012); S.C. CODE ANN. § 44-41-330(C) (2012); S.D. CODIFIED LAWS § 34-23A-10.1(2)(d) (2012); TEX. HEALTH & SAFETY CODE ANN. § 171.012(b)(2) (West 2011); UTAH CODE ANN. § 76-7-305(2)(a) (West 2012); VA. CODE ANN. § 18.2-76(B) (West 2012); W. VA. CODE ANN. § 16-2I-2(b) (West 2012); WIS. STAT. § 253.10(3)(c)(1) (West 2011).

consent or receive a judicial waiver, absent exigent medical circumstances, before they can obtain an abortion.<sup>216</sup> Moreover, most states specifically require that a physician perform the actual abortion procedure.<sup>217</sup> Forty states have reporting laws that require doctors performing abortions to document the number of procedures they perform and provide this information to various government agencies.<sup>218</sup>

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216. ALA. CODE §§ 26-21-1-8 (2012); ALASKA STAT. ANN. §§ 18.16.010-.040 (West 2012); ARIZ. REV. STAT. § 36-2152 (2012); ARK. CODE ANN. §§ 20-16-801-810 (West 2012); CAL. HEALTH & SAFETY CODE § 123450 (West 2012); COLO. REV. STAT. ANN. §§ 12-37.5-102 to -108 (West 2012); DEL. CODE ANN. tit. 24, §§ 1780-1789B (West 2012); FLA. STAT. ANN. § 390.01114 (West 2012); GA. CODE ANN. §§ 15-11-110-118 (West 2012); IDAHO CODE ANN. §§ 18-609A-G (West 2012); 750 ILL. COMP. STAT. ANN. 70/1/99 (West 2012); IND. CODE ANN. § 16-34-2-4 (West 2012); IOWA CODE § 135L.3 (West 2012); KAN. STAT. ANN. § 65-6705 (West 2012); KY. REV. STAT. ANN. § 311.732 (West 2012); LA. REV. STAT. ANN. § 40:1299.35.5 (2012); ME. REV. STAT. ANN. tit. 22, § 1597-A(2) (2011); MD. CODE ANN., HEALTH-GEN. § 20-103 (West 2012); MASS. GEN. LAWS. ch.112, § 12S (West 2012); MICH. COMP. LAWS ANN. § 722.903 (West 2012); MINN. STAT. ANN. § 144.343 (West 2012); MISS. CODE ANN. §§ 41-41-51 to -63 (West 2012); MO. ANN. STAT. § 188.028 (West 2012); MONT. CODE ANN. § 50-20-201 to -215 (West 2011); NEB. REV. STAT. ANN. § 28-327.09 (West 2012); N.C. GEN. STAT. ANN. §§ 90-21.6-.10 (West 2012); N.D. CENT. CODE ANN. §§ 14-02.1-03(1) to .1-03.1 (West 2011); OHIO REV. CODE ANN. § 2919.12(B)-.121, 2151.85 (West 2011); OKLA. STAT. ANN. tit. 63, §§ 1-740 to -740.5 (West 2012); 18 PA. CONS. STAT. ANN. § 3206 (West 2012); R.I. GEN. LAWS ANN. § 23-4.7-6 (West 2012); S.C. CODE ANN. §§ 44-41-31 to -37 (2012); S.D. CODIFIED LAWS §§ 34-23A-7-7.1 (2012); TENN. CODE ANN. §§ 37-10-301 to -308 (West 2012); TEX. FAM. CODE ANN. §§ 33.001-.011 (West 2011); UTAH CODE ANN. §§ 76-7-304 to -304.5 (West 2012); VA. CODE ANN. § 16.1-241(V) (West 2012); W. VA. CODE ANN. §§ 16-2F-1 to -9 (West 2012); WIS. STAT. ANN. § 48.375 (West 2011); WYO. STAT. ANN. § 35-6-118 (West 2012).

217. ALASKA STAT. ANN. § 18.16.010(a)(1) (2012); ARIZ. REV. STAT. § 36-2155 (2012); ARK. CODE ANN. § 5-61-101 (West 2012); CAL. BUS. & PROF. CODE § 2253 (West 2012); CONN. AGENCIES REGS. § 19-13-D54(a) (West 2012); DEL. CODE ANN. tit. 24, § 1790(a) (West 2012); FLA. STAT. ANN. § 390.0111(2) (West 2012); GA. CODE ANN. § 16-12-141(b)(2) (West 2012); HAW. REV. STAT. § 453-16(a)(1) (West 2012); IDAHO CODE ANN. § 18-608A (West 2012); IND. CODE ANN. § 16-34-2-1 (West 2012); IOWA CODE § 135L.3 (West 2012); KAN. STAT. ANN. § 65-6703(a) (West 2012); KY. REV. STAT. § 311.723, .750 (West 2012); LA. REV. STAT. ANN. § 40:1299.35.2(A) (2012); ME. REV. STAT. ANN. tit. 22, § 1598(3)(A) (2011); MD. CODE ANN., HEALTH-GEN. § 20-208 (West 2012); MASS. GEN. LAWS ANN. ch. 112, §§ 12L-12M (West 2012); MINN. STAT. ANN. § 145.412(1) (West 2012); MISS. CODE ANN. § 97-3-3(1) (West 2012); MO. ANN. STAT. § 188.020 (West 2012); MONT. CODE ANN. § 50-20-109(1)(a) (West 2011); NEB. REV. STAT. ANN. § 28-335 (West 2012); NEV. REV. STAT. ANN. § 442.250(1)(a) (West 2011); N.M. STAT. ANN. § 30-5-1(C) (West 2012); N.Y. PENAL LAW § 125.05(3) (McKinney 2012); N.C. GEN. STAT. ANN. § 14-45.1(a)-(b) (West 2012); N.D. CENT. CODE ANN. § 14-02.1-04(1) (West 2011); OKLA. STAT. ANN. tit. 63, § 1-731 (West 2011); 18 PA. CONS. STAT. ANN. § 3204 (West 2012); R.I. CODE R. § 14-000-009(5.1) (LexisNexis 2012); S.C. CODE ANN. § 44-41-20 (2012); S.D. CODIFIED LAWS §§ 34-23A-3-5 (2012); TEX. HEALTH & SAFETY CODE ANN. § 171.003 (West 2011); UTAH CODE ANN. § 76-7-302(2) (West 2012); VA. CODE ANN. §§ 18.2-72 to -74 (West 2012); WIS. STAT. ANN. § 940.15(5) (West 2011); WYO. STAT. ANN. § 35-6-111 (West 2012).

218. ARIZ. REV. STAT. §§ 36-2161 to -2164 (2012); ARK. CODE ANN. § 20-18-603(b) (West 2012); CONN. AGENCIES REGS. § 19-13-D54(b) (West 2012); DEL. CODE ANN. tit. 16, § 3133, tit. 24, § 1790(c) (West 2012); FLA. STAT. ANN. § 390.0112 (West 2012); GA. CODE ANN. §§ 16-12-141(d), 31-10-19 (West 2012); IDAHO CODE ANN. § 39-261 (West 2012); 720 ILL. COMP. STAT. ANN. 510/10 (West 2012); 77 ILL. CODE R. 505.10-.50 (LexisNexis 2011); 20 IND. CODE ANN. § 16-34-2-5 (West 2012); IOWA CODE § 144.29A (West 2012); KAN. STAT.

However, current enforcement mechanisms for these abortion laws often differ from one jurisdiction to the next, rendering critical procedural guidelines less than clear. For example, Texas and Washington specify that the Department of Health is to enforce their abortion legislation,<sup>219</sup> but Massachusetts allows the Attorney General to file a petition to enjoin an illegal abortion upon his or her belief that a violation is about to occur.<sup>220</sup> To be sure, if state law permitted private citizens to make similar petitions, and if courts were specifically directed to appoint guardians *ad litem* for prenatal children in danger of being illegally aborted, literally hundreds, if not thousands, of lives could be saved and law enforcement agencies could more effectively prevent violations of law before they occur.<sup>221</sup>

### *C. Common Objections to Appointing Guardians Ad Litem for Prenatal Children*

#### *1. Susan Goldberg's Arguments Against the Appointment of Guardians Ad Litem for Prenatal Children*

According to pro-abortion advocates, there is a qualitative difference between infringing on a parent's autonomy to protect an existing child and impinging on the autonomy of a pregnant woman to protect a prenatal child.<sup>222</sup> For example, Susan Goldberg, a Delaware law

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ANN. § 65-445 (West 2012); KY. REV. STAT. ANN. § 213.101 (West 2012); LA. REV. STAT. ANN. § 40:48(B), 40:63-66 (2012); ME. REV. STAT. ANN. tit. 22, § 1596(2) (2011); MASS. GEN. LAWS ANN. ch.112, § 12R (West 2012); MICH. COMP. LAWS ANN. § 333.2835(2), .2837 (West 2012); MINN. STAT. ANN. § 145.4131 (2010); MO. REV. STAT. § 188.052 (West 2012); MONT. CODE ANN. § 50-20-110 (West 2011); NEB. REV. STAT. ANN. § 28-344 (West 2012); NEV. REV. STAT. ANN. § 442.256 (West 2011); N.M. STAT. ANN. § 24-14-18 (West 2012); N.C. GEN. STAT. ANN. § 14-45.1(c) (West 2012); N.D. CENT. CODE ANN. § 14-02.1-07 (West 2012); OHIO REV. CODE ANN. § 3701.79 (West 2011); OKLA. STAT. ANN. tit. 63, § 1-738n (West 2012); OR. REV. STAT. ANN. § 435.496 (West 2012); 18 PA. CONS. STAT. ANN. § 3214 (West 2012); R.I. CODE R. § 14-000-009(6.2) (2011); S.C. CODE ANN. § 44-41-60 (2012); S.D. CODIFIED LAWS §§ 34-23A-19, -34 to -45 (2012); TENN. CODE ANN. § 68-3-505, 39-15-203 (West 2012); TEX. HEALTH & SAFETY CODE ANN. § 245.011 (West 2011); UTAH CODE ANN. § 76-7-313 (West 2012); VT. STAT. ANN. tit. 18, § 5222 (West 2011); VA. CODE ANN. § 32.1-264 (West 2012); 12 VA. ADMIN. CODE § 5-550-120 (2011); WASH. ADMIN. CODE § 246-490-100 (2011); W. VA. CODE § 16-5-22 (West 2012); WIS. STAT. ANN. § 69.186 (West 2011); WYO. STAT. ANN. §§ 35-6-107 to -108 (West 2012).

219. TEX. HEALTH & SAFETY CODE ANN. § 171.005 (West 2012); WASH. REV. CODE ANN. § 9.02.005 (West 2012).

220. MASS. GEN. LAWS ANN. ch.112, § 12U (West 2012).

221. "By these estimates, Gosnell performed *at least* four or five illegal abortions every week." Report of the Grand Jury, *supra* note 194, at 79. At a rate of four per week fifty weeks out of the year for the sixteen years Gosnell's clinic went uninspected, we get a number of 3,200 illegal abortions performed by Gosnell alone. In addition, Gosnell and his staff likely committed hundreds of cases of infanticide.

222. Susan Goldberg, *Of Gametes and Guardians: The Impropriety of Appointing Guardians Ad Litem for Fetuses and Embryos*, 66 WASH. L. REV. 503, 533 (1991). This

professor, has argued that existing children are “separate entities” and protecting them does not require invading the personal physical autonomy and privacy of another individual.<sup>223</sup> In her 1991 article entitled *Of Gametes and Guardians: The Impropriety of Appointing Guardians Ad Litem for Fetuses and Embryos*, Goldberg admits that the State’s *parens patriae* powers may sometimes restrict the autonomy of parents; however, she maintains that the exercise of such authority “does not concomitantly invade their privacy over choices concerning their own persons.”<sup>224</sup> Parents of victims of child abuse who have endured the lengthy processes of adjudication and reunification would likely disagree.

Contrary to Goldberg’s belief, the government can and often will interfere with parents’ decisions concerning their own bodies or their lifestyles in general. Once child protective proceedings have commenced, the juvenile court has the authority to order various “services” for a particular parent, which may include mandatory diagnostic and substance abuse assessments or compulsory drug screens.<sup>225</sup> A judge or magistrate may also enter “no contact” orders. Thus, parents of so-called “existing children” are clearly not immune from invasions of their privacy.

Similarly, as the U.S. Supreme Court declared in *Roe v. Wade*, a “pregnant woman cannot be isolated in her privacy.”<sup>226</sup> Because a prenatal child necessarily develops in his or her mother’s womb, the situation is inherently different from other “zones of privacy.”<sup>227</sup> Because the pregnant woman’s right of personal privacy is no longer “sole,” her privacy interests must be measured against the government’s important and legitimate interest in protecting the so-called “potentiality” of human life.<sup>228</sup>

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line of argument, however, assumes the very issue in play: Is a prenatal child an “existing child”?

223. *Id.*

224. *Id.* Of course, the fact that certain drugs are illegal means that certain “personal choices” having to do with one’s “own body” are off the table *regardless* of whether the person is pregnant or has children.

225. *E.g.*, *Frequently Asked Questions*, JUVENILE OFFICE, CRAWFORD CNTY., ARK., <http://www.crawford-county.org/juvenile/faq.aspx> (last visited Mar. 23, 2013) (“According to A.C.A. 9-27-325 (e)(2), the Court may order the father, mother, or child to submit to scientific testing for drug or alcohol abuse. Parent(s) may be held in Contempt for refusing to submit to a Court ordered drug screen.”).

226. 410 U.S. 113, 159 (1973).

227. *Id.* (“She carries an embryo and, later, a fetus, if one accepts the medical definitions of the developing young in the human uterus. . . . The situation therefore is inherently different from marital intimacy, or bedroom possession of obscene material, or marriage, or procreation, or education . . .”).

228. *Id.* (“As we have intimated above, it is reasonable and appropriate for a State to decide that at some point in time another interest, that of health of the mother or that

Goldberg also argues that providing guardians *ad litem* for prenatal children “undermines a woman’s position as a competent, independent individual,”<sup>229</sup> but her assertion ignores an obvious reality: not all people are competent, independent individuals. Many parents are unable or unwilling to properly care for the needs of their children. The very fact that guardian *ad litem* legislation already exists in every single state proves that society does not assume that all women are competent, independent individuals. Pregnant women are no exception.

Goldberg further asserts that appointing a guardian *ad litem* for a prenatal child forces a pregnant woman to justify her conduct to another individual, “potentially compelling her to divulge intimate and private details of her life,”<sup>230</sup> but such argument overlooks an important aspect of legal representation: guardians *ad litem* in many states are required to obey applicable rules of professional responsibility.<sup>231</sup> In Michigan, for example, MCL 712A.17(d)(1)(k) specifically provides:

The lawyer-guardian [*ad litem*]’s powers and duties include at least all of the following: . . . *Consistent with the rules of professional responsibility*, to identify common interests among the parties and, to the extent possible, promote a cooperative resolution of the matter through consultation with the child’s parent, foster care provider, guardian, and caseworker.<sup>232</sup>

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of potential human life, becomes significantly involved. The woman’s privacy is no longer sole and any right of privacy she possesses must be measured accordingly.”).

229. Goldberg, *supra* note 222, at 533–34.

230. *Id.* at 534 (“This information might encompass information about diet, including consumption of caffeine, alcohol, sulfites, fats and sugars; her levels of exercise, weight gain and sexual activity; her work conditions and home environment; her use of seatbelts; her use of plane travel; and other details of ordinary life that could affect fetal development.”).

231. CONN. GEN. STAT. ANN. § 46b-129a(2) (West 2012) (“The primary role of any counsel for the child shall be to advocate for the child in accordance with the Rules of Professional Conduct . . .”); MD. RULE CAL (2011) (“Nothing contained in the Guidelines is intended to modify, amend, or alter the fiduciary duty that an attorney owes to a client pursuant to the Maryland Lawyers’ Rules of Professional Conduct.”); ALM PROB. & FAM. CT. S.O. 1-08(D)(1.5) (Court Rules) (“The GAL shall adhere to the ethical guidelines and standards for his or her profession to the extent that these guidelines apply.”); MICH. COMP. LAWS § 712A.17d(k) (West 2012) (Guardians *ad litem* are to identify common interests among the parties, “consistent with the rules of professional responsibility . . .”); TEX. FAM. CODE § 107.003(1)(A) (2012) (Guardians *ad litem* are to perform their duties consistent with the Texas Rules of Professional Conduct); *see also* Children’s Task Force, *supra* note 35 (“Due to the special needs of the child and the court in proceedings with children, the relationship between the GAL and client is somewhat different than traditional lawyer/client relationships. . . . These differences do not give the GAL the right to disregard other professional responsibilities. Thus . . . the GAL is expected to obey the professional responsibilities as described in the Michigan Rules of Professional Conduct.”).

232. MICH. COMP. LAWS § 712A.17(d)(1)(k) (West 2012) (emphasis added).



Moreover, these child advocates are not permitted to release any information except as necessary to perform the duties associated with their appointment.<sup>233</sup> Overall, the duties of a guardian *ad litem* are loosely equated with taking a course of action that an intelligent and reasonable person would decide to pursue.<sup>234</sup> There are fundamental personal rights at stake in all legal proceedings, but judicial intervention in child protection cases is benevolently motivated.<sup>235</sup> In every case, the guardian *ad litem*'s sole duty is to the child and that duty is created to give the State "an avenue to press its interests in the protection and well-being of children."<sup>236</sup>

Another common argument against guardian *ad litem* representation for unborn children is that there are too many difficulties associated with determining what the "best interests" of a particular prenatal child actually are. The challenge to provide adequate legal representation for prenatal children may be imposing, but it is not impossible.<sup>237</sup> According to Goldberg, the sheer difficulty of ascertaining the "best interests" of an unborn child will "endow a fetal guardian [*ad litem*] with the authority to take actions to protect fetuses . . . based on that guardian's subjective notions of what constitutes appropriate behavior."<sup>238</sup>

Goldberg's argument that a guardian *ad litem* for a prenatal child is more likely to act upon his or her subjective beliefs than an ordinary guardian *ad litem* is groundless.<sup>239</sup> The risk of bias exists in every case in which a complete stranger is appointed to advocate for the best interests of a particular child, not just in cases involving

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233. Cromley Jr., *supra* note 1, at 603.

234. *Id.* at 607. In addition, "[i]t is only by a clear expression of the court that the guardian [*ad litem*] can assure herself that she is fulfilling the expectations of the judicial system." *Id.*

235. MICHIGAN CHILD WELFARE LAW, *supra* note 173, at 55 ("While the intent and purpose of the juvenile court intervention in child protection cases has been a benevolently motivated one—to help families in trouble, keeping children at home to the extent possible—we ought not lose sight of the fact that the fundamental personal rights are at stake for both parents and children.").

236. Cromley Jr., *supra* note 1, at 592.

237. MARVIN R. VENTRELL & DONALD N. DUQUETTE, EDS., CHILD WELFARE LAW AND PRACTICE: REPRESENTING CHILDREN, PARENTS, AND STATE AGENCIES IN ABUSE, NEGLECT, AND DEPENDENCY CASES, xxxi (2005) [hereinafter CHILD WELFARE LAW] ("The challenge to provide quality legal representation for children . . . is enormous. . . . At the same time, child welfare law has become an increasingly complex area of practice that requires lawyers to not only understand complex federal and state law and procedure, but also detailed institutional information regarding child welfare funding streams, treatment and placement options, medicine, mental health, and child development. And all of this takes place in a context of devastating abuse, neglect, and poverty, which makes the work emotionally taxing.").

238. Goldberg, *supra* note 222, at 535.

239. *Id.*

prenatal children. While these “fetal clients” cannot tell their advocates anything that would aid in representing their legal rights, cases involving substantiated allegations of maternal substance abuse would rarely involve grey areas where a guardian *ad litem* would actually need information from the unborn child. Either the expectant mother is objectively harming her child, or she is not. To be sure, this issue would be no easier to resolve if the child were a newborn infant. Furthermore, although a guardian *ad litem* is granted access to all information that bears on the issue of the child’s best interests, he or she is mute on issues that do not directly impact the welfare of the child.<sup>240</sup> Finally, the professional assessment of an appointed guardian *ad litem* is meant to be only *one* consideration for the judicial officer to consider in making a final decision.<sup>241</sup> Courts will remain the “trier of fact” and can accept or reject portions of a particular recommendation.<sup>242</sup>

Goldberg also forecasts that forcing judges to determine what sort of maternal behavior should trigger the appointment of a guardian *ad litem* for prenatal children will “lead courts into impossible conundrums.”<sup>243</sup> Delineating “prenatal abuse” is a tricky endeavor, but prenatal children should not have to suffer simply because the process is too bewildering.<sup>244</sup> The complexity of a matter does not determine the standard for one’s legal rights. The “duties” pregnant women already have to their unborn children are not merely “moral obligations,” as Goldberg suggests.<sup>245</sup> As noted at length throughout

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240. Cromley Jr., *supra* note 1, at 592 (“The guardian [*ad litem*] is mute on all other issues except to the extent that they directly impact upon the welfare of the child(ren).”).

241. *Id.* at 595 (“Since the best interest standard requires consideration of all relevant factors, it is not within the discretion of the guardian [*ad litem*] to omit from her report that information which the guardian [*ad litem*] feels does not support her conclusions. The guardian [*ad litem*]’s report is meant to be only one consideration for the court in making a final binding decision.”).

242. *Id.* at 596.

243. Goldberg, *supra* note 222, at 537. She continues, “How would the conduct necessitating the appointment of a guardian [*ad litem*] be defined? Who would have standing to call for such an appointment? While most would agree that illegal substance abuse is potentially harmful to a fetus and should be proscribed, once courts engage the issue it would be logically difficult to justify failing to prohibit all conduct which may injure a fetus.” *Id.*

244. Emily M. Dargatz, Comment, *Legal Representation of a Fetus: The Mother and Child Disunion?*, 18 CAP. U. L. REV. 591, 604 (1989) (“The issue of fetal representation in our legal arenas presents a myriad of other dilemmas which this comment does not attempt to address. Such issues include the problem of costs to our society in terms of court time and insurance and the difficulty in promulgating legislation which would ‘enforce’ a pregnant woman’s behavior. Additionally, one cannot ignore the unique and inevitable problems which seem always to accompany domestic issues. The problems and issues surrounding this subject are indeed delicate and confusing. But these are all things which the courts need to consider when they embark on this new horizon of litigation.”).

245. See Goldberg, *supra* note 222, at 530 (“Professor John Robertson posits that when a woman ‘decides to forgo abortion and the state chooses to protect the fetus, the woman loses the liberty to act in ways that would adversely affect the fetus.’ Contrary to

this article, pregnant women have long been held legally responsible for harm inflicted upon their prenatal children. Moreover, if third parties can be held criminally liable for harming unborn children, so can the mothers of these defenseless children. Again, numerous states have expressly recognized that prenatal children have an important interest in receiving medical treatment even when the recommended procedure runs counter to their mothers' wishes.

There is no question that a pregnant woman has a legal duty to avoid harm or threatened harm to her prenatal child's welfare.<sup>246</sup> Having recognized the legal duties that pregnant women already owe to their unborn children, the next logical step is for the government to take proactive steps to enforce those duties by appointing a guardian *ad litem* whenever an expectant mother fails to fulfill her legal duty to her unborn child. The alleged difficulty of determining what constitutes cognizable harm does not change this obvious reality.

## 2. Erin Linder's Arguments Against the Appointment of Guardians Ad Litem for Prenatal Children

Another author, Erin Linder, has openly opposed the Wisconsin legislation allowing the government to take drug-addicted or alcohol dependent women into custody to protect their unborn children. Her 2005 article entitled *Punishing Prenatal Alcohol Abuse: The Problems Inherent in Utilizing Civil Commitment to Address Addiction* asserts that any such law will discourage pregnant women with unresolved substance abuse issues from seeking essential prenatal care;<sup>247</sup> however, this argument is faulty because it assumes that a pregnant drug

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Robertson's beliefs, such duties are properly viewed as moral obligations, but cannot create legal obligations without incurring unacceptable costs to the civil liberties of women.").

246. See MICH. COMP. LAWS § 722.622(2)(f) (West 2012) (defining child abuse as "harm or threatened harm to a child's health or welfare that occurs through nonaccidental physical or mental injury"); see also MICH. COMP. LAWS § 712A.19(b)(3) (West 2012) ("The court may terminate a parent's parental rights to a child if the court finds, by clear and convincing evidence, 1 or more of the following . . . (b) The child or a sibling of the child has suffered physical injury or physical or sexual abuse under 1 or more of the following circumstances: (i) The parent's act caused the physical injury or physical or sexual abuse and the court finds that there is a reasonable likelihood that the child will suffer from injury or abuse in the foreseeable future if placed in the parent's home. (ii) The parent who had the opportunity to prevent the physical injury or physical or sexual abuse failed to do so and the court finds that there is a reasonable likelihood that the child will suffer injury or abuse in the foreseeable future if placed in the parent's home. (iii) A nonparent adult's act caused the physical injury or physical or sexual abuse and the court finds that there is a reasonable likelihood that the child will suffer from injury or abuse by the nonparent adult in the foreseeable future if placed in the parent's home.").

247. Erin N. Linder, Note, *Punishing Prenatal Alcohol Abuse: The Problems Inherent in Utilizing Civil Commitment to Address Addiction*, 2005 U. ILL. L. REV. 873, 891 (2005) (discussing Wisconsin's statute allowing a pregnant woman with severe drug and alcohol abuse problems to be taken into custody for the protection of her unborn child).

addict who would otherwise seek treatment would cease doing so on the off chance that she could be investigated and ultimately taken into custody after a hearing.

Of course, the same reasoning could be applied to current child protective statutes which allow government agencies to take custody of children whenever there is sufficient evidence of abuse or neglect. It could be argued that such legislation, including mandatory reporting laws for medical care givers, would discourage abusive parents from seeking medical treatment for their children. Even if true, such reasoning does not justify government inaction in any child abuse case, whether in utero or after the child is born.

Linder also claims that making otherwise legal alcohol consumption punishable while a woman is pregnant may inadvertently open doors for the government to regulate numerous other legal activities that could conceivably harm an unborn child, such as smoking cigarettes or eating unhealthy food.<sup>248</sup> There are two main problems with this argument. First, many jurisdictions already have laws permitting courts to consider substance abuse as a factor in determining parental fitness in child protective proceedings.<sup>249</sup> Of course, these existing statutes have not compelled prosecutorial agencies to charge parents with abuse or neglect merely because they smoke cigarettes or allow their children to consume unhealthy snacks.

Secondly, Linder's fear of irrepressible government intrusion seems highly unlikely given the very specific language included in the Wisconsin statute, the only one of its kind. Wisconsin Assembly Bill 292 legislatively finds that an unborn child is endangered by the "habitual lack of self-control of their expectant mothers in the use of alcohol beverages, controlled substances or controlled substance analogs, exhibited to a severe degree."<sup>250</sup> Moreover, the jurisdictional requirements set forth in Wis. Stat. § 48.133 already provide a sound legal framework for all cases involving reported maternal substance abuse:

The court has exclusive original jurisdiction over an unborn child alleged to be in need of protection or services which can be ordered

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248. *Id.* at 898.

249. *E.g.*, ALASKA STAT. ANN. § 47.10.011(10) (West 2012); CAL. WELF. & INST. CODE § 361.5 (West 2012); DEL. CODE ANN. tit. 10, § 901(18)(b)(2) (West 2012); FLA. STAT. ANN. § 39.806(1)(j) (West 2012); GA. CODE ANN. § 15-11-94(b)(4)(B)(ii) (West 2012); KY. REV. STAT. ANN. § 600.020(1)(a)(3) (West 2012); MONT. CODE ANN. § 41-3-609(2)(c) (West 2012); R.I. GEN. LAWS § 40-11-2(1)(v) (West 2012); *but see* N.Y. FAM. CT. ACT § 1012(f)(i)(B) (McKinney 2012) (drug or alcohol abuse does not constitute neglect in the absence of a showing that the child's physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired).

250. WIS. STAT. ANN. § 48.01(1)(am) (West 2011).

by the court whose expectant mother habitually lacks self-control in the use of alcohol beverages, controlled substances or controlled substance analogs, exhibited to a severe degree, to the extent that there is a substantial risk that the physical health of the unborn child, and of the child when born, will be seriously affected or endangered unless the expectant mother receives prompt and adequate treatment for that habitual lack of self-control.<sup>251</sup>

Despite what one author has argued, this statute does not allow for “a zealous police officer who observes a pregnant woman drinking cocktails at a bar [to] take the woman into immediate custody if the officer believes that the woman’s drinking poses a severe risk to her fetus.”<sup>252</sup> In fact, this specific child welfare legislation does not allow pregnant women to be taken into custody for doing any other legal activity. Only the most harmful maternal conduct, habitual drug and alcohol abuse, is proscribed in order to protect the health of the prenatal child.

Finally, Linder urges her readers to conclude that any statute requiring a pregnant woman to be taken into custody is merely reactive to the problem of maternal substance abuse because much of the damage has already been done.<sup>253</sup> The absurdity of this argument is apparent if you apply her reasoning to the context of a born child who is being abused. No one would legitimately argue that a child who has been harmed in the past should remain in the abusive environment simply because the bulk of the damage has already been done. It is the function of the government to protect children, both born and prenatal, if parents are willing to blatantly disregard their life and health.

#### *D. Prenatal Children Are Especially Susceptible to Abuse and Neglect*

All children are vested with certain fundamental human rights, including a right to physical health and safety.<sup>254</sup> Moreover, all children need competent and zealous advocates in legal proceedings that

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251. WIS. STAT. ANN. § 48.133 (West 2011).

252. Lynn M. Paltrow, *Governmental Responses to Pregnant Women Who Use Alcohol or Other Drugs*, 8 DEPAUL J. HEALTH CARE L. 461, 492 (2005).

253. Linder, *supra* note 247, at 883.

254. DAVID KATNER ET AL., NAT’L ASSOC. OF COUNSEL FOR CHILDREN, NACC RECOMMENDATIONS FOR REPRESENTATION OF CHILDREN IN ABUSE AND NEGLECT CASES 5 (2001), available at [http://floridaschildrenfirst.org/04\\_reports/proj/Representation\\_of\\_Children/National/nacc\\_recommendations\\_for\\_representation.doc](http://floridaschildrenfirst.org/04_reports/proj/Representation_of_Children/National/nacc_recommendations_for_representation.doc) (“The NACC believes that each child must be valued as a unique human being, regardless of race, ethnicity, religion, age, social class, physical or mental disability, gender, or sexual orientation. Each child is vested with certain fundamental rights, including a right to physical and emotional health and safety.”).

can permanently impact their lives.<sup>255</sup> As the National Association of Counsel for Children observed in its *Recommendations for Representation of Children in Abuse and Neglect Cases*, children who are the subjects of child protective proceedings are typically the most profoundly affected by the judicial intervention and corresponding rulings.<sup>256</sup>

Prenatal children also need legal representation for the obvious reason that the life of a child begins long before birth.<sup>257</sup> Numerous medical studies have revealed that a prenatal child develops very rapidly in the womb.<sup>258</sup> By the twenty-second day of gestation the heart begins to beat.<sup>259</sup> Moreover, by the end of the third week, the backbone, spinal column, and nervous system are developing.<sup>260</sup> By the fortieth day, brain waves can be recorded,<sup>261</sup> and by the eighth week, all body systems are present.<sup>262</sup> Sleeping habits usually develop in the

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255. *Id.* at 5–6 (“In order to achieve the physical and emotional well being of children, we must promote legal rights and remedies for children. This includes empowering children by ensuring that courts hear and consider their views in proceedings that affect their lives. . . . Children need competent, independent, and zealous attorneys. The system of representation must require the appointment of competent, independent, zealous attorneys for every child at every stage of the proceedings.”).

256. *Id.* at 5. (“The NACC believes that in order for justice to be done in child abuse and neglect related court proceedings, all parties, including children, must be represented by independent *legal* counsel. The children who are the subjects of these proceedings are usually the most profoundly affected by the decisions made, and these children are usually the least able to voice their views effectively on their own.”).

257. *Fetal Development, Chronology of a New Life*, RIGHT TO LIFE OF MICH., [http://www.rtl.org/prolife\\_issues/fetaldevelopment\\_chrono.html](http://www.rtl.org/prolife_issues/fetaldevelopment_chrono.html) (last visited Mar. 23, 2013) [hereinafter RIGHT TO LIFE OF MICHIGAN] (“Every new and unique human being begins his or her life at the moment of fertilization and, if not interrupted, will someday grow into an adult man or woman.”).

258. *What the Unborn Sense in the Womb: Interview With Dr. Carlo Bellieni*, ZENIT.COM (Oct. 4, 2005), <http://www.ewtn.com/library/PROLIFE/zunbrnsns.HTM> (“Already in the eighth week after conception the receivers of touch are present in the fetus in the area of the mouth, which later are extended throughout the whole surface of the body in a few months. But it is around the 22nd to 24th week when the connections will be ready with the cerebral cortex. The fetus responds to the stimuli that come through the mother’s womb. . . . Research was published in Pediatrics in 2001 which showed that at the moment of weaning the child prefers tastes that it perceived in the uterus in a certain period, although these tastes were not given to it during lactation. Therefore the fetus has memory.”); *What’s It Like in the Womb?*, MEDICINET.COM, <http://www.medicinenet.com/script/main/art.asp?articlekey=51723> (last visited Mar. 23, 2013) (“Your baby’s hearing is intact by the third trimester, when sonograms show that a fetus will actually turn its head to respond to a sound. But studies have shown that your unborn child can hear sounds as early as 20 weeks and will be startled by loud noises at about 25 weeks”).

259. RIGHT TO LIFE OF MICHIGAN, *supra* note 257.

260. *Id.*

261. *Id.* (“Fingers and feet are beginning to develop. . . . Facial features, including ears, nose, lips and tongue, form with clarity during this month. Eyes form and darken when pigment is produced around day 35. Eyelids cover the eyes and will soon form a protective seal, reopening during the seventh month. Near the end of the month the skeleton changes from cartilage to bone. Forty muscle sets begin their first exercises and, working with the nervous system, respond with small movements to touch.”).

262. *Id.*

fifth month, and remarkably, as in the case of Amillia Taylor,<sup>263</sup> babies born relatively close to this stage of development have survived.<sup>264</sup>

In addition, more recent medical research has confirmed that prenatal children have the ability to experience pain by the twentieth week of gestation, and possibly as early as the sixteenth week.<sup>265</sup> It has even been suggested that unborn children may feel pain even more intensely than newborn infants due to the fact that pain inhibitory mechanisms do not develop until between thirty-two and thirty-four weeks.<sup>266</sup> The ability of an unborn child to feel pain even before

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263. Aida Edemariam, *Against All Odds*, GUARDIAN (Feb. 20, 2007), <http://www.guardian.co.uk/society/2007/feb/21/health.lifeandhealth> (“There is something otherworldly about the picture that appeared around the world yesterday: two tiny brown-pink feet, almost translucent, poking through an adult’s fingers. You had to look twice to be sure that they were indeed feet. They belong to Amillia Taylor, who was born in Miami last October, 21 weeks and six days after conception. She weighed less than 10oz at birth—not even as much as two ordinary bars of soap—and she was just 9½ inches long. Amillia, who is expected to be discharged from hospital in the next couple of days, is officially the most premature baby ever to have survived.”).

264. *Id.* Moreover, a federal judge has also made an interesting point in this regard. One year before the decision in *Roe v. Wade*, a federal district court heard arguments on the constitutionality of Connecticut’s law prohibiting all abortion except to save the life of the mother. *Abele v. Markle*, 351 F. Supp. 224 (D. Conn. 1972). Judge Clarie, in a dissent, argued that while birth was a precondition to citizenship, only *creation* was necessary to claim rights. He pointed out the distinction by way of analogy to corporations, which are considered persons despite never being born. *Id.* at 234 (Clarie, J., dissenting); cf. U.S. CONST. amend. XIV, § 1 (basing *citizenship* and the rights that come with it on birth or naturalization in the United States, but also protecting some rights of *persons* regardless of citizenship). He hinged his argument in part on the words of the Declaration of Independence: “that all men are created equal.” *Id.* (quoting THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776)). A similar argument was made that same year by a state court judge in *Byrn v. New York City Health & Hospitals Corp.* in which a guardian *ad litem* for an unborn child sought a declaratory judgment striking down New York’s new, more permissive abortion law as unconstitutional. 288 N.E. 2d 887 (N.Y. 1972). Judge Adrian Burke, in dissent, argued that the Declaration of Independence has the force of law, and thus the U.S. Constitution and all state constitutions must not conflict with it. *Id.* at 893 (Burke, J., dissenting). He also argued that the Declaration restated the natural law, which provides the standard by which to determine the validity of positive law, including constitutions, and that the rights set forth in it are beyond the power of the state to curtail. *Id.* Perhaps his most powerful argument in this regard, however, comes at the very beginning of his dissent, where he states that the majority’s characterization of the issue of whether to afford legal personality to the unborn as a “policy question” was similar to the arguments made in the Nuremberg trials by German officials. *Id.* at 892.

265. Kanwaljeet S. Anand, EXPERT REPORT OF DR. KANWALJEET S. ANAND, M.B.B.S., D.PHIL. 5 (Report to Congress, Jan. 15, 2004).

266. *Id.* at 8. In response to this evidence, Oklahoma and Utah have passed law requiring abortionists to anesthetize prenatal children after 20 weeks gestation if the woman consents. OKLA. STAT. ANN. tit. 63, § 1-738.9 (West 2012); UTAH CODE ANN. § 76-7-308.5 (West 2012). Other states have passed laws requiring that women be informed about the capacity of her unborn child to feel pain before the abortion procedure is performed. ARK. CODE ANN. § 20-16-1103 (West 2012); GA. CODE ANN. § 31-9A-4(a)(3) (West 2012); OKLA. STAT. ANN. tit. 63, § 1-738.8 (West 2012). Louisiana and Minnesota have passed laws requiring that the woman be informed at least 24 hours prior to her abortion about the availability of anesthetics and analgesics for her prenatal child. LA. REV. STAT. ANN. § 40:1299.35.6(B)(1)(g) (2012); MINN. STAT. ANN. § 145.4242 (West 2012).

viability is compelling evidence that developing babies should be protected from unnecessary suffering, which can be accomplished through the appointment of a child advocate as soon as the judicial officer becomes aware of a substantiated allegation of maternal substance abuse. Indeed, some lawmakers are already taking proactive measures to reform current abortion legislation to afford greater legal protection to prenatal children. In Arizona, for example, a federal judge recently relied upon this “substantial and well-documented” medical evidence in upholding the constitutionality of a new law that has been called “the most extreme abortion ban in America.”<sup>267</sup>

Pregnant women are supposed to be the most powerful advocates for the life of their unborn children.<sup>268</sup> Yet it is estimated that approximately one in every ten prenatal children in the United States is exposed to cocaine in the womb.<sup>269</sup> Many states have defined “child abuse” as harm or threatened harm to a child’s health or welfare that occurs through non-accidental physical or mental injury, sexual abuse, sexual exploitation, or maltreatment, by any person responsible for the child’s health or welfare.<sup>270</sup> In 2009, Child Protective Services

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267. *The “Most Extreme” Abortion Ban in America: A Guide*, THE WEEK (July 31, 2012), <http://theweek.com/article/index/231301/the-most-extreme-abortion-ban-in-america-a-guide> (“Arizona’s severe new abortion law is set to go into effect this week, thanks to a federal judge who ruled it constitutional. The law, signed by Republican Gov. Jan Brewer earlier this year, forbids doctors from aborting fetuses with a gestational age of 20 weeks or older, which is before the 23- to 24-week milestone when a doctor can confirm that a pregnancy will likely not result in a miscarriage, a stillborn, or an infant who will die soon after being born. That means some women could have to give birth to stillborn babies. The law has been assailed by abortion-rights advocates and civil-rights groups, who say it violates Supreme Court precedent and will cause wanton emotional damage to mothers.”).

268. See *Gonzales v. Carhart*, 550 U.S. 124, 159 (2007) (“Respect for human life finds an ultimate expression in the bond of love the mother has for her child.”).

269. Cynthia L. Glaze, Comment, *Combating Prenatal Substance Abuse: The State’s Current Approach and the Novel Approach of Court-Ordered Protective Custody of the Fetus*, 80 MARQ. L. REV. 793, 793 (1997).

270. CAL. WELF. & INST. CODE § 18951(e) (West 2012) (“‘Child abuse’ as used in this chapter means a situation in which a child suffers from any one or more of the following: (1) Serious physical injury inflicted upon the child by other than accidental means. (2) Harm by reason of intentional neglect or malnutrition or sexual abuse. (3) Going without necessary and basic physical care. (4) Willful mental injury, negligent treatment, or maltreatment of a child under the age of 18 years by a person who is responsible for the child’s welfare under circumstances that indicate that the child’s health or welfare is harmed or threatened thereby, as determined in accordance with regulations prescribed by the Director of Social Services. (5) Any condition that results in the violation of the rights or physical, mental, or moral welfare of a child or jeopardizes the child’s present or future health, opportunity for normal development or capacity for independence.”); FLA. STAT. ANN. § 39.0015(3)(b) (West 2012) (“Definitions.—As used in this section . . . ‘Child abuse’ means abandonment, abuse, harm, mental injury, neglect, physical injury, or sexual abuse of a child as those terms are defined in ss. 39.01, 827.04, and 984.03.”); MICH. COMP. LAWS ANN. § 722.622(2)(f) (2012); N.J. STAT. ANN. § 9:6-8.9 (West 2012) (“‘Abused child’ means a child under the age of 18 years whose parent, guardian, or other person having his custody and control: a. Inflicts or allows to be inflicted upon such child physical injury by other



estimated that 702,000 children were victims of maltreatment.<sup>271</sup> Not surprisingly, the group most likely to be maltreated was infants under the age of one.<sup>272</sup> According to the United States Department of Health and Human Services, an estimated 1,560 children died from abuse and neglect in 2010.<sup>273</sup> That same year, statistical reports also confirmed that child advocacy centers across the nation provided services to at least 266,000 child victims of abuse.<sup>274</sup> In 2011, that total number was over 279,000.<sup>275</sup> Moreover, the government has reported that 80.8% of all child abuse fatalities occur in children less than four years old and 46.2% of all child abuse fatalities involve children under the age of one.<sup>276</sup> Perhaps surprisingly, studies have shown that the most likely person to abuse or kill a child is his or her own mother.<sup>277</sup>

### *E. Maternal Substance Abuse Causes Irreparable Harm to Prenatal Children*

There is no question that a pregnant woman threatens the health and welfare of her unborn child when she uses controlled

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than accidental means which causes or creates a substantial risk of death, or serious or protracted disfigurement, or protracted impairment of physical or emotional health or protracted loss or impairment of the function of any bodily organ; b. Creates or allows to be created a substantial or ongoing risk of physical injury to such child by other than accidental means which would be likely to cause death or serious or protracted disfigurement, or protracted loss or impairment of the function of any bodily organ.”); TEX. FAM. CODE ANN. § 261.001(1)(C) (West 2011) (“‘Abuse’ includes the following acts or omissions by a person . . . physical injury that results in substantial harm to the child, or the genuine threat of substantial harm from physical injury to the child, including an injury that is at variance with the history or explanation given and excluding an accident or reasonable discipline by a parent, guardian, or managing or possessory conservator that does not expose the child to a substantial risk of harm”); VA. CODE ANN. § 63.2-100(1) (West 2012) (“‘Abused or neglected child’ means any child less than 18 years of age: 1. Whose parents or other person responsible for his care creates or inflicts, threatens to create or inflict, or allows to be created or inflicted upon such child a physical or mental injury by other than accidental means, or creates a substantial risk of death, disfigurement, or impairment of bodily or mental functions.”).

271. U.S. DEPT. OF HEALTH & HUMAN SERVS. ET AL., CHILD MALTREATMENT 21 (2009) [hereinafter CHILD MALTREATMENT 2009], available at [http://www.acf.hhs.gov/programs/cb/stats\\_research/index.htm#can](http://www.acf.hhs.gov/programs/cb/stats_research/index.htm#can).

272. *Id.* at 22.

273. U.S. DEPT. OF HEALTH & HUMAN SERVS. ET AL., CHILD MALTREATMENT 58 (2010) hereinafter CHILD MALTREATMENT 2010], available at <http://www.acf.hhs.gov/programs/cb/pubs/cm10/cm10.pdf>.

274. *National Statistics on Child Abuse*, NAT’L CHILDREN’S ALLIANCE, <http://www.nationalchildrensalliance.org/NCANationalStatistics> (last visited Mar. 23, 2013) (“47 states reported approximately 3.4 million children received preventative services from Child Protective Services agencies. . . . Nearly 80% of reported child fatalities as a result of abuse and neglect were caused by one or more of the child victim’s parents.”).

275. *Id.*

276. CHILD MALTREATMENT 2009, *supra* note 271, at 55.

277. *Id.* at 56.

substances<sup>278</sup> or consumes alcohol during pregnancy.<sup>279</sup> Some states have already expressly defined “child abuse” to encompass maternal substance abuse. For example, lawmakers in Florida fashioned the statutory definition of “harm” to include any “exposure” to illegal drugs or alcohol:

“Harm” to a child’s health or welfare can occur when any person: . . . Exposes a child to a controlled substance or alcohol. Exposure to a controlled substance or alcohol is established by: 1. A test, administered at birth, which indicated that the child’s blood, urine, or meconium contained *any amount of alcohol or a controlled substance or metabolites of such substances*, the presence of which was not the result of medical treatment administered to the mother or the newborn infant; or 2. Evidence of extensive, abusive, and chronic use of a controlled substance or alcohol by a parent when the child is demonstrably adversely affected by such usage.<sup>280</sup>

Arguably, prenatal abuse is one of the most severe forms of child abuse because it disrupts human development.<sup>281</sup> More recent medical

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278. BLACK’S LAW DICTIONARY 329 (6th ed. 1990) (defining a “controlled substance” as “[a]ny drug so designated by law whose availability is restricted; *i.e.*, so designated by federal or state Controlled Substances Acts. . . . Included in such classification are narcotics, stimulants, depressants, hallucinogens, and marijuana.”).

279. *See, e.g.*, Beatrice Larroque et al., *Moderate Prenatal Alcohol Exposure and Psychomotor Development at Preschool Age*, 85 AM. J. PUB. HEALTH 1654, 1654 (1995) (finding that consuming 1.5 oz. or more of pure alcohol per day (approximately three drinks) has negative effect on preschool psychomotor development); Raja A. S. Mukherjee et al., *Fetal Alcohol Spectrum Disorder: An Overview*, 99 J. ROYAL SOC’Y MED. 298, 298–301 (2006) (discussing the effects of Fetal Alcohol Syndrome, including hyperactivity, attention deficits, planning difficulties, learning/memory problems, lower IQ, arithmetic difficulties, receptive language difficulties, verbal processing problems, and social understanding difficulties); Elizabeth R. Sowell et al., *Regional Brain Shape Abnormalities Persist into Adolescence After Heavy Prenatal Alcohol Exposure*, 12 CEREBRAL CORTEX 856, 856 (2002) (discussing changes in brain composition in children exposed to alcohol in utero). *But see* Ian Walpole et al., *Is There a Fetal Effect with Low to Moderate Alcohol Use Before or During Pregnancy?*, 44 J. EPIDEMIOLOGY & COMMUNITY HEALTH 297, 299–300 (1990) (finding that low to moderate alcohol consumption (less than 28 mL) had no discernible effects on newborn clinical status).

280. FLA. STAT. ANN. § 39.01(32)(2)(g) (West 2012) (emphasis added).

281. *See, e.g.*, Larroque et al., *supra* note 279 at 1657, 1658; Gale A. Richardson et al., *The Effects of Prenatal Cocaine Use on Infant Development*, 30 NEUROTOXICOLOGY & TERATOLOGY 96, 101–02 (2008) (discussing how cocaine use in the second trimester was associated with significantly lower motor scores on the Bayley Scales of Infant Development); Lynn T. Singer et al., *Prenatal Cocaine Exposure: Drug and Environmental Effects at 9 Years*, 153 J. PEDIATRICS 105, 105–07 (2008) (discussing the effect of prenatal cocaine exposure on perceptual reasoning IQ); Lynn T. Singer et al., *Cognitive and Motor Outcomes of Cocaine-Exposed Infants*, 287 JAMA 1952, 1952 (2002) (discussing the significant cognitive defects seen in children up to two years after in utero cocaine exposure); Sowell et

studies have focused on the dangers of maternal drug addiction during pregnancy.<sup>282</sup> The evidence suggests that prenatal children exposed to drugs in the womb may suffer a lifetime of impairment, particularly when their mothers use drugs during the critical first trimester.<sup>283</sup> For example, the severe long-term effects of cocaine on a prenatal child, in addition to addiction and withdrawal at birth, can include low birth weight, short body length at birth, smaller head circumference than normal infants, high incidence of physical abnormalities such as deformed kidneys and neural tube defects, and an increased likelihood of experiencing learning disabilities.<sup>284</sup>

A 1995 study revealed that an estimated 11% of pregnant women use controlled substances during pregnancy.<sup>285</sup> Moreover, the federal government has calculated that an infant exposed to controlled substances while in the womb costs society approximately one million dollars over the course of his or her lifetime.<sup>286</sup> Undeniably, maternal substance abuse has a dramatic effect on society as a whole, which demonstrates yet another reason why the State has a compelling interest in protecting the unborn.<sup>287</sup> Harming prenatal children short

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al., *supra* note 279, at 863 (discussing changes in brain composition in children exposed to alcohol in utero).

282. See, e.g., David A. Bateman & Claudia A. Chiriboga, *Dose-Response Effect of Cocaine on Newborn Head Circumference*, 106 PEDIATRICS e33, 36 (2000); Glaze, *supra* note 269, at 793; Lynne M. Smith et al., *The Infant Development, Environment, and Lifestyle Study: Effects of Prenatal Methamphetamine Exposure, Polydrug Exposure, and Poverty on Intrauterine Growth*, 118 PEDIATRICS 1149, 1149, 1152 (2006) (discussing lower gestational age at birth and lower birth weight of infants exposed to methamphetamines in utero).

283. Goldberg, *supra* note 222, at 515–16 (“Studies documenting the detrimental effects of drug and alcohol use during pregnancy now supplement the growing literature on the dangers of substance abuse. The use of illicit drugs, alcohol and other substances during pregnancy can have a variety of negative effects on developing fetuses, including reduced birth weight, intrauterine growth retardation, abruptio placenta, urinary tract defects, reduced head circumference, and the birth of addicted newborns who suffer from withdrawal. The evidence suggests that these infants may suffer from a lifetime of impairments, particularly when drugs are used during the formatively critical first trimester.”) (footnotes omitted).

284. See Bateman & Chiriboga, *supra* note 282, at 36; Glaze, *supra* note 269, at 793; Smith et al., *supra* note 282, at 1149, 1152 (discussing lower gestational age at birth and lower birth weight of infants exposed to methamphetamines in utero).

285. Glaze, *supra* note 269, at 793 (citing *Legal Interventions*, *supra* note 83, at 2669).

286. *Id.*

287. *Id.* at 793–94. (“Individual states are searching for ways to approach and remedy this problem. The goal of the state in this crisis appears to be two-fold: (1) to penalize the mother for her illegal actions in an effort to deter the problem, and (2) to protect potential life from subsequent medical problems. In many states, prosecutors attempt to criminally charge mothers who have abused a controlled substance during pregnancy. However, without a statute covering such actions, their efforts have been futile when reviewed by the courts. Although criminal prosecution of mothers achieves the state’s goal of penalizing the mother, it is questionable how the state is promoting or protecting the health of the fetus by such actions. Therefore, a better way to achieve the state’s goals must exist.”).

of killing them is clearly costly to society. Worse still, aborting them has far more astronomical consequences; not only a moral cost, but a fiscal one as well. Many researchers have spent years calculating the economic impact of abortion and their reported results are startling:

“We found that the 50.5 million surgical abortions since 1970 have cost the U.S. an astonishing \$35 trillion dollars,” in lost Gross Domestic Product, he told LifeNews.com on Monday. “However, if you include all the babies lost to IUDs, RU-486, sterilization, and abortifacients, the number climbs to \$70 trillion.” . . . Howard indicates the estimates are based on GDP per capita per year times the cumulative number of abortions since 1970.<sup>288</sup>

At least one researcher has also cited the Soviet Union as a cautionary tale of how abortion can quite literally devastate a national economy. “The main reason for their collapse was internal—300 abortions for every 100 live births,” he said. “Right now, there are not enough younger women to reverse their population decline. They are expected to lose another 40 million people between now and 2050.”<sup>289</sup> To be sure, these lifestyle “choices” involve not only pregnant women and their babies, but society as a whole.

#### *F. Prenatal Children Deserve the Same Legal Representation as Newborn Infants*

It is not hard to understand why children need to be specially represented in legal matters involving them.<sup>290</sup> As several scholars fairly recently observed, “[c]hild protection cases are now handled

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288. Steven Ertelt, *Researcher: Abortions Cost Economy \$35 Trillion Since 1970 in Lost Productivity*, LIFE NEWS.COM (Oct. 13, 2008, 9:00 AM), <http://www.lifenews.com/2008/10/13/nat-4440/> (“He said that is a more conservative approach than that used by government agencies, such as the EPA—which employs an ‘estimated statistical life’ as a benchmark for its cost/benefit analyses for new regulations. A typical ESL averages about \$7.8 million per human life and Howard says using that as a standard shows the cost for all abortions to date would be more than 11 times his estimate, or an excess of \$390 trillion.”).

289. *Id.*; see also Paul Kengor, *Obama and the Marxist/Communist View of Marriage and Abortion*, AMERICAN THINKER (May 16, 2012), [http://www.americanthinker.com/2012/05/obama\\_and\\_the\\_marxistcommunist\\_view\\_of\\_marriage\\_and\\_abortion.html](http://www.americanthinker.com/2012/05/obama_and_the_marxistcommunist_view_of_marriage_and_abortion.html) (“By the early 1920s, Bolshevik Russia had the most liberal abortion policies in the world. And what happened? Just like divorce, abortion exploded. In fact, the proliferation in abortions was so bad that it shocked even Planned Parenthood founder Margaret Sanger during a trip to Russia in 1934. By the 1970s, when America was just getting around to legalizing abortion, the Soviet Union was averaging over 7 million abortions per year—dwarfing the very worst rates in America post-*Roe v. Wade*. The direct effect of this on the Russian population has been staggering. For the record, Russia’s horrific abortion rates are common in communist countries, which to this day lead the world in abortions.”).

290. Children’s Task Force, *supra* note 35.

in a rights-based legal process where unrepresented parties do not fair well.”<sup>291</sup> Courts often rely upon other participants to protect a particular child’s interests; however, despite the noblest of intentions, these other individuals may have conflicting interests.<sup>292</sup> For instance, while the judge presiding over a particular case is expected to ferret out justice amidst multiple competing requests, the social service agency is expected to help the entire family and must often distribute scarce resources to numerous children.<sup>293</sup> Since neither judges nor social service agencies are available to a particular child at all times, the child needs a champion.<sup>294</sup> That champion is the guardian *ad litem*.

Usually parents are in the best position to protect the welfare of their own children, but parental autonomy is not absolute. Our society has long recognized the authority of the government to intervene when parents are not acting in the best interests of their born children. And now, more than ever before, states such as Wisconsin are allowing courts to intervene when expectant mothers are unable or unwilling to protect their own unborn children from preventable harm. “The basis for intervention in child maltreatment is grounded in the concept of *parens patriae*—a legal term that asserts the government’s role in protecting the interests of children and intervening when parents fail to provide proper care.”<sup>295</sup>

Juvenile courts, by design, embody this *parens patriae* philosophy that the government should act as a “guardian” of children.<sup>296</sup> Prenatal children are particularly in need of legal protection because they are incapable of protecting themselves. Sadly, even mandatory reporting statutes cannot guarantee adequate protection since harm inflicted upon a prenatal child is far less visible than damage done to

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291. *Forward to CHILD WELFARE LAW*, *supra* note 237.

292. Children’s Task Force, *supra* note 35 (“In many instances, courts have relied upon other participants in the process to look out for a child’s interests. Despite good intentions, other participants may have divided loyalties and interests and may not be committed to ferreting out and promoting the interests of the child alone.”).

293. *Id.*

294. *Id.* (“For the same reason an adult would not go to a serious IRS audit without assistance or would not want one’s own child hospitalized without a parent available to monitor the care provided—the child caught up in the legal process needs a champion. That champion ought to be a competent and knowledgeable professional who is able to pursue the child’s rights and interests in whatever forums are required.”).

295. JILL GOLDMAN ET AL., U.S. DEPT OF HEALTH & HUMAN SERVS., A COORDINATED RESPONSE TO CHILD ABUSE AND NEGLECT: THE FOUNDATION FOR PRACTICE 51 (2003), available at <http://www.childwelfare.gov/pubs/usermanuals/foundation/foundation.pdf>.

296. MICHIGAN CHILD WELFARE LAW, *supra* note 173, at 53 (“The Juvenile Court embodies *parens patriae* philosophy that the State should act as benevolent protector and guardian of those citizens, such as children, mentally incompetent persons and others unable to protect or care for themselves.”).

a born child. A teacher may find a bruise on a student, but the internal damage following a pregnant woman's heroin injection is largely hidden from public view. A prenatal child cannot talk to anyone or seek assistance, and, of course, the same can be said of very young born children.

In cases involving reports of maternal substance abuse, the suitability of the pregnant woman to care for her prenatal child is necessarily called into question. Accordingly, the prenatal child desperately needs an independent advocate. Interestingly enough, many guardian *ad litem* statutes specifically provide for such representation "when the interests of the parents conflict with the child's best interests."<sup>297</sup> When a pregnant woman is engaging in behavior that can permanently harm her developing baby, there is definitely a conflict of interest between parent and child.

The guardian *ad litem*'s client is the child; thus, in cases involving allegations of maternal substance abuse, the client is the prenatal child. Child clients are obviously in a class of their own since "[t]hey do not hire or fire their advocates."<sup>298</sup> Despite the fact that advocating for a prenatal child would be unlike all other forms of legal representation, children in utero nevertheless deserve the same protection in legal proceedings that born children enjoy. The fact that children are less capable of defending themselves than are adults is precisely why guardians *ad litem* are so commonly appointed in the first place. Since this same logic applies even more strongly to prenatal children, it makes sense from both a legal and a moral standpoint to appoint guardians *ad litem* for all children, born or unborn. Indeed, the long-term consequences to the life and health of the prenatal client would make the role of an appointed guardian *ad litem* crucial at every stage of the legal proceedings.<sup>299</sup>

The earliest cases in which a guardian *ad litem* was sought or appointed to represent the interests of a prenatal child involved challenges to a woman's right to kill her unborn baby by having an abortion.<sup>300</sup> The government obviously has a duty to look after persons,

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297. COLO. REV. STAT. ANN. § 19-1-111(2)(a)(II) (West 2012); GA. CODE ANN. § 15-11-9(b) (West 2012); 705 ILL. COMP. STAT. ANN. 405/2-17(b)(3) (West 2012); MISS. CODE ANN. § 43-21-121(1)(d) (West 2012); MONT. CODE ANN. § 41-5-1411 (West 2011); N.D. CENT. CODE ANN. § 27-20-48 (West 2012); OHIO REV. CODE ANN. § 2151.281(A)(2) (West 2011); TENN. CODE ANN. § 37-1-149(a)(1) (West 2012); W. VA. CODE ANN. § 48-5-107(f) (2012).

298. Children's Task Force, *supra* note 35.

299. See *Foreword to CHILD WELFARE LAW*, *supra* note 237 ("Children in particular are unable to speak for themselves in court. They require legal counsel, particularly when one considers that the outcomes of these proceedings involve basic human needs, family relationships, and safety decisions that can be a matter of life and death.").

300. Goldberg, *supra* note 222, at 521 ("Typically, cases in which guardians [*ad litem*] have been sought or appointed have been of three types: abortion cases, forced medical treatment cases and cases involving allegations of substance abuse during pregnancy.").

such as children, who are unable to protect themselves, but does the government, as *parens patriae*, have an equivalent duty to protect unborn children? If so, to what extent can courts intervene to protect prenatal life? To answer these and related questions, lawmakers and courts alike almost always focus on *Roe v. Wade*, despite the patent irrelevance of this controversial ruling outside the context of abortion.

*G. Roe v. Wade Is Irrelevant to the Appointment of Guardians Ad Litem for Prenatal Children*

The significance of *Roe v. Wade* is familiar: unless and until this decision is overturned, the right of personal privacy now includes a pregnant woman's right to kill her unborn child.<sup>301</sup> However, the U.S. Supreme Court also discussed the State's important and legitimate interest in protecting the "potentiality of human life."<sup>302</sup> Consequently,

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301. See *Roe v. Wade*, 410 U.S. 113, 155 (1973) ("Although the results are divided, most . . . courts have agreed that the right of privacy . . . is broad enough to cover the abortion decision; that the right, nonetheless, is not absolute and is subject to some limitations; and that at some point the state interests as to protection of health, medical standards, and prenatal life, become dominant. We agree with this approach.").

302. *Id.* at 162 ("We repeat, however, that the State does have an important and legitimate interest in preserving and protecting the health of the pregnant woman, whether she be a resident of the State or a nonresident who seeks medical consultation and treatment there, and that it has still *another* important and legitimate interest in protecting the potentiality of human life."). The phrase "potentiality of human life" is misleading insofar as it suggests that the life of a human being does not begin until birth. Arguably, a more suitable phrase is "prenatal life" or "potential life *outside of the mother's womb*." See also *Planned Parenthood v. Casey*, 505 U.S. 833, 871 (1992) ("Yet it must be remembered that *Roe v. Wade* speaks with clarity in establishing not only the woman's liberty but also the State's 'important and legitimate interest in potential life.' That portion of the decision in *Roe* has been given too little acknowledgment and implementation by the Court in its subsequent cases." (citing *Roe v. Wade*, 410 U.S. at 163)); *Gonzales v. Carhart*, 550 U.S. 124, 157–58 (2007) ("The government may use its voice and its regulatory authority to show its profound respect for the life within the woman. A central premise of the opinion was that the Court's precedents after *Roe* had 'undervalue[d] the State's interest in potential life.' . . . The three premises of *Casey* must coexist. The third premise, that the State, from the inception of the pregnancy, maintains its own regulatory interest in protecting the life of the fetus that may become a child, cannot be set at naught by interpreting *Casey*'s requirement of a health exception so it becomes tantamount to allowing a doctor to choose the abortion method he or she might prefer. Where it has a rational basis to act, and it does not impose an undue burden, the State may use its regulatory power to bar certain procedures and substitute others, all in furtherance of its legitimate interests in regulating the medical profession in order to promote respect for life, including life of the unborn. The Act's ban on abortions that involve partial delivery of a living fetus furthers the Government's objectives. No one would dispute that, for many, D&E is a procedure itself laden with the power to devalue human life. . . . Congress determined that the abortion methods it proscribed had a 'disturbing similarity to the killing of a newborn infant,' and thus it was concerned with 'draw[ing] a bright line that clearly distinguishes abortion and infanticide.' The Court has in the past confirmed the validity of drawing boundaries to

pro-abortion and pro-life advocates continue to debate whether this interest in potential life extends outside the context of abortion.

Pro-abortion advocates attempt to cast *Roe* and its progeny as supporting the notion that the State's interest in "potential" life exists only in abortion cases,<sup>303</sup> and those seeking to protect the lives of pre-natal children read *Roe* and its progeny to recognize that the State's interest in protecting human life exists at conception and therefore extends outside the context of abortion.<sup>304</sup> Pro-abortion advocates contend that even if *Roe* can be read to say that rights exist for pre-natal children, any such rights are simply not compelling enough to override a pregnant woman's liberty to make decisions about her body.<sup>305</sup> In response, pro-life advocates insist that when an expectant mother chooses *not* to terminate her pregnancy ("terminate" being understood as deliberately taking the life of the prenatal child), she loses "the [legal autonomy] to act in ways that would adversely affect" the child in utero.<sup>306</sup>

Surely the State's legitimate interest in protecting the life of an unborn child is compelling enough to override the mother's right to abuse her body.<sup>307</sup> As previously discussed in earlier sections of this article, courts have ruled that children may bring a cause of action against parents for violating their important "right to begin life with a sound mind and body,"<sup>308</sup> which implies that children also have interests before they are born. One could argue that the interest at stake only "attaches" or becomes cognizable at birth, but this reasoning does not change the fact that a prenatal child's right to be born in sound

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prevent certain practices that extinguish life and are close to actions that are condemned." (citations omitted).

303. Glaze, *supra* note 269, at 796.

304. *Id.* at 796–97 ("On the other hand, fetal rights advocates broadly interpret *Roe* as implying that the state's interest in potential life exists at conception, not just upon viability. Based on the decisions in *Webster v. Reproductive Health Services* and *Planned Parenthood v. Casey*, these advocates believe the view that the fetus' independent legal rights exist before viability was affirmed by the Supreme Court. In addition, such advocates look at the rights already afforded to a fetus as justification for extending fetal rights in other circumstances.").

305. *Id.* at 796.

306. *Id.* at 797 (alteration in original).

307. *Roe v. Wade*, 410 U.S. 113, 150 (1973) ("Only when the life of the pregnant mother herself is at stake, balanced against the life she carries within her, should the interest of the embryo or fetus not prevail. Logically, of course, a legitimate state interest in this area need not stand or fall on acceptance of the belief that life begins at conception or at some other point prior to live birth. In assessing the State's interest, recognition may be given to the less rigid claim that as long as at least *potential* life is involved, the State may assert interests beyond the protection of the pregnant woman alone.").

308. *Womack v. Buchhorn*, 187 N.W.2d 218, 222 Mich. (1971) (quoting *Smith v. Brennan*, 157 A.2d 497, 503 (N.J. 1960)). *Womack* recognized a tort action for negligent injuries caused to a child during gestation. *Id.*



condition necessitates that this interest existed *prior* to his or her birth. Simply stated, if this right did not pre-exist birth it could not be violated before birth.

Pro-abortion advocates also routinely emphasize the fact that most child abuse and neglect statutes do not explicitly provide a basis for protecting prenatal children “through the vehicle of the guardian [*ad litem*]”<sup>309</sup> to bolster their argument that such legislation was not intended to protect prenatal children. The government has the authority, and given the stakes involved the moral and social duty, to construe “child” broadly to include prenatal children in all cases involving substantiated allegations of maternal substance abuse.<sup>310</sup> Indeed, numerous states have already done this.<sup>311</sup>

The “right” at issue in *Roe* was not the right of a pregnant woman to abuse or neglect her child; rather, *Roe* and its progeny established that the right of personal privacy encompasses an expectant mother’s decision to take the life of the prenatal child through the act of abortion. The “right” to kill announced in *Roe v. Wade* did not encompass a right to damage the unborn child short of accomplishing certain death, and even this “right” to kill is not without limits.

Nevertheless, pro-abortion advocates regularly argue that because a prenatal child resides within his or her mother, according the unborn baby any independent legal right threatens the privacy interests of the pregnant woman. Once again, *Roe* and its progeny established that the right of personal privacy encompasses a woman’s decision to terminate her pregnancy by having an abortion.<sup>312</sup> However, as soon as a pregnant woman *chooses* to forego abortion, or the statutory timetable to procure a legal abortion has passed, the State’s interest in protecting the life of the prenatal child shifts outside the context of abortion and *Roe v. Wade* becomes irrelevant. *Roe* and its progeny were abortion cases, not dependency proceedings. Moreover,

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309. Goldberg, *supra* note 222, at 532.

310. Referring to prenatal life as “potential life” in furtherance of an argument that prenatal life is not life begs the question in the classic sense: it comprises an assumption of what it asserts, rather than a demonstration of it.

311. ARK. CODE ANN. § 12-18-103(13)(B)(i) (West 2012); COLO. REV. STAT. ANN. § 19-3-102(1)(g) (2012); 705 ILL. COMP. STAT. ANN. 405/2-3(1)(c) (West 2013); IND. CODE ANN. § 31-34-1-10 (West 2012); IOWA CODE ANN. § 232.68(2)(f) (West 2011); LA. CHILD. CODE ANN. art. 603(22) (2012); MD. CODE ANN., CTS. & JUD. PROC. § 3-818 (West 2012); S.D. CODIFIED LAWS § 26-8A-2(9) (2012); TEX. FAM. CODE ANN. § 161.001(1)(R) (West 2011); WIS. STAT. ANN. § 48.01 (West 2011).

312. *Roe v. Wade*, 410 U.S. 113, 152–53 (1973) (“The Constitution does not explicitly mention any right of privacy. In a line of decisions, however . . . the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. . . . This right of privacy . . . is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.”(citations omitted)).

those cases involved constitutional challenges to state criminal abortion legislation,<sup>313</sup> not allegations of child abuse and neglect.<sup>314</sup>

The appellant in *Roe* argued that a pregnant woman is entitled to “terminate her pregnancy” (kill her unborn child) at whatever time, in whatever way, and for whatever reason she chooses. The United States Supreme Court disagreed, stating: “We, therefore, conclude that the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests in regulation.”<sup>315</sup> Almost twenty years later, in *Planned Parenthood v. Casey*, the Supreme Court utilized an “undue burden” test to determine what restrictions states could place on a woman’s access to abortion.<sup>316</sup> That subsequent decision defined “undue burden” as “shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a non-viable fetus. A statute with this purpose is invalid.”<sup>317</sup>

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313. *Id.* at 116 (“This Texas federal appeal and its Georgia companion . . . present constitutional challenges to state criminal abortion legislation.” (citation omitted)). See also *Planned Parenthood v. Casey*, 505 U.S. 833, 871 (1992) (“The woman’s right to terminate her pregnancy before viability is the most central principle of *Roe v. Wade*.”). A resource for information on litigation in this area is the “Personhood USA” website. *Legal Resources*, PERSONHOOD USA, <http://personhoodeducation.org/legal-resources/> (last visited Mar. 23, 2013).

314. While under *Roe* in some circumstances the prenatal baby does not have a right to life as against his or her mother’s actions killing him/her, the prenatal child does have a right as against his/her mother’s actions inflicting permanent brain damage on him/her.

315. *Roe*, 410 U.S. at 153–54. Although the Court uses the phrase “abortion decision,” it in fact reached the deathly act that would follow the “decision” as well:

On the basis of elements such as these, appellant and some *amici* argue that the woman’s right is absolute and that she is entitled to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses. With this we do not agree. Appellant’s arguments that Texas either has no valid interest at all in regulating the abortion decision, or no interest strong enough to support any limitation upon the woman’s sole determination, are unpersuasive. The Court’s decisions recognizing a right of privacy also acknowledge that some state regulation in areas protected by that right is appropriate. As noted above, a State may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life. . . . The privacy right involved, therefore, cannot be said to be absolute. In fact, it is not clear to us that the claim asserted by some *amici* that one has an unlimited right to do with one’s body as one pleases bears a close relationship to the right of privacy previously articulated in the Court’s decisions. The Court has refused to recognize an unlimited right of this kind in the past.

*Id.*

316. 505 U.S. 833, 871 (1992) (“Yet it must be remembered that *Roe v. Wade* speaks with clarity in establishing not only the woman’s liberty but also the State’s ‘important and legitimate interest in potential life.’ That portion of the decision in *Roe* has been given too little acknowledgment and implementation by the Court in its subsequent cases.” (citations omitted)).

317. *Id.* at 877.

Because the appointment of a guardian *ad litem* for a prenatal child in no way limits the ability of a woman to obtain a legal abortion, there is no undue burden placed on the expectant mother when the State intervenes to protect the life and health of her prenatal child. Although the right of personal privacy is broad enough to encompass the “abortion decision,” that right is not absolute. The “right to choose” is not the right to abuse.

#### IV. WISCONSIN LAW PROVIDING GUARDIANS *AD LITEM* FOR PRENATAL CHILDREN IN NEED OF PROTECTION

Lawmakers in Wisconsin have already paved the way for child welfare reform outside the context of abortion. At the time of this writing, Wisconsin is the only state that specifically provides for the appointment of guardians *ad litem* for prenatal children.<sup>318</sup> On June 16, 1998, Governor Tommy Thompson signed Wisconsin Assembly Bill 292 into law.<sup>319</sup> This unprecedented piece of legislation revised Wisconsin’s Children Code to grant the government jurisdiction over prenatal children “alleged to be in need of protection or services” if and when a prospective mother:

[H]abitually lacks self-control in the use of alcohol beverages, controlled substances or controlled substance analogs, exhibited to a severe degree, to the extent that there is a substantial risk that the physical health of the unborn child, and of the child when born, will be seriously affected or endangered unless the expectant mother receives prompt and adequate treatment for that habitual lack of self-control.<sup>320</sup>

Additionally, this revolutionary statute also provides guardian *ad litem* representation “for any unborn child alleged or found to be in need of protection or services.”<sup>321</sup> Most importantly, “unborn child” is defined in this statute as “a human being from the time of fertilization to the time of birth.”<sup>322</sup>

Not unlike the vast majority of existing guardian *ad litem* statutes designed to protect born children, the Wisconsin statute directs

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318. See N.J. STAT. ANN. § 30:4C-11 (West 2012) (“Whenever it shall appear that any child within this State is of such circumstances that the child’s safety or welfare will be endangered unless proper care or custody is provided, an application setting forth the facts in the case may be filed with the Division of Child Protection and Permanency. . . . The provisions of this section shall be deemed to include an application on behalf of an unborn child when the prospective mother is within this State at the time of application for services.”).

319. Wis. Assemb. B. Hist. AB463, 93 Sess. (Wis. 1997).

320. WIS. STAT. ANN. § 48.133 (West 2011).

321. *Id.* § 48.235(1)(e)-(2).

322. *Id.* § 48.02(19).

these appointed advocates to make recommendations as to the “best interests” of the unborn child.<sup>323</sup> An appointed guardian *ad litem* may even petition to terminate parental rights after the child is born.<sup>324</sup> However, a separate statute requiring mandatory reporting of suspected child abuse references only “children” and does not mention prenatal children. Prenatal children are not specifically referenced until a later section of the law referring to those who “may” report suspected child abuse to the authorities.<sup>325</sup> This has led at least one commentator to believe that there is no mandatory reporting requirement for prenatal child abuse.<sup>326</sup>

That being said, the legislative foundation for this statute clarifies that mandatory reporters of child abuse such as physicians, nurses, social workers, teachers, day care providers, and law enforcement officers would be required to report situations in which a prenatal child was in need of protection from abuse or threatened abuse.<sup>327</sup> In fact, other individuals who are not “mandatory reporters” are also encouraged to report the abuse or threatened abuse of prenatal children just as they would make a report for the sake of a born child.<sup>328</sup> There is no question that Wisconsin Assembly Bill 292 was passed to provide legal representation for prenatal children in dire need of protection from their own mothers.

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323. *Id.* § 48.235(3)(a) (“The guardian [*ad litem*] shall be an advocate for the best interests of the person or unborn child for whom the appointment is made. The guardian [*ad litem*] shall function independently, in the same manner as an attorney for a party to the action, and shall consider, but shall not be bound by, the wishes of that person or the positions of others as to the best interests of that person or unborn child.”).

324. *Id.* § 48.235 (4m)(a).

325. *Id.* § 48.981(b)(1) (“Any person reporting under this section may request an immediate investigation by the sheriff or police department if the person has reason to suspect that the health or safety of a child or of an unborn child is in immediate danger. Upon receiving such a request, the sheriff or police department shall immediately investigate to determine if there is reason to believe that the health or safety of the child or unborn child is in immediate danger and take any necessary action to protect the child or unborn child.”).

326. Paltrow, *supra* note 252, at 493 (“Perhaps in response to the widespread opposition of medical groups, the Wisconsin statute does not include a mandatory reporting provision . . . reporting becomes mandatory in Wisconsin only after the birth of a child. As a result, the law appears to have thus far been applied only rarely.”).

327. Wis. Assemb. LRB-3642/1, 93 Sess. (Wis. 1997) (“Specifically, under the bill, a mandatory reporter having reasonable cause to suspect that an unborn child seen in the course of professional duties has been abused or having reason to believe that an unborn child seen in the course of professional duties is at substantial risk of abuse must, and a discretionary reporter having reason to suspect that an unborn child has been abused or reason to believe that an unborn child is at substantial risk of abuse may, report that suspected or threatened abuse to the sheriff, local police department or county department. The sheriff or local police department, and county department, then must investigate and take action in the same manner as they investigate and take action with respect to a child abuse or neglect report under current law.”).

328. *Id.*

The child welfare reform pioneered by Wisconsin lawmakers closely followed the highly debated case of *State of Wisconsin ex rel. Angela M.W., Petitioner-Petitioner, v. William Kruzicki*.<sup>329</sup> On April 22, 1997, the Supreme Court of Wisconsin held that the government had no legal right to hold a pregnant woman against her will, even though she was clearly endangering the life of her viable prenatal child by using cocaine during pregnancy.<sup>330</sup> In so ruling, the appellate court refused to apply the existing child endangerment statute as it was then written to unborn children.<sup>331</sup>

Slightly more than three months after the date of this controversial decision, lawmakers acted to legislatively reverse it. On July 31, 1997, Assembly Bill 463 was introduced to the Wisconsin Assembly.<sup>332</sup> Just over one year later, a brand new law passed that specifically allowed what the highest court in Wisconsin had ruled impermissible under the previous statute.<sup>333</sup> Since then, despite numerous claims that this legislation violates both the Due Process and the Equal Protection Clauses of the Constitution, no legal challenges have been upheld.<sup>334</sup> Today, well over a decade later, WIS. STAT. § 48.235, as well as the amendments to Chapter 48 enacted by Assembly Bill 292, are still good law.

## V. LEGISLATIVE SOLUTIONS

This article has examined the need for swift expansion of existing child welfare legislation to include guardian *ad litem* representation for prenatal children in all cases involving substantiated allegations of maternal substance abuse and planned illegal abortion.

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329. 209 Wis. 2d 112, 116–18 (1997), *superseded by statute*, WIS. STAT. §§ 48.133, 235 (“The petitioner was an adult carrying a viable fetus with a projected delivery date of October 4, 1995. Based upon observations made while providing the petitioner with prenatal care, her obstetrician suspected that she was using cocaine or other drugs. Blood tests performed on May 31, June 26, and July 21, 1995, confirmed the obstetrician’s suspicion that the petitioner was using cocaine or other drugs. On July 21, 1995, the obstetrician confronted the petitioner about her drug use and its effect on her viable fetus. The petitioner expressed remorse, but declined the obstetrician’s advice to seek treatment. On August 15, 1995, a blood test again confirmed that the petitioner was ingesting cocaine or other drugs. Afterward, the petitioner canceled a scheduled August 28, 1995, appointment, and rescheduled the appointment for September 1, 1995. When she failed to keep the September 1 appointment, her obstetrician reported his concerns to Waukesha County authorities.”).

330. *Id.* at 134.

331. *Id.*

332. A.B. 463, 93rd Reg. Sess. (Wis. 1997).

333. *Id.*

334. Linder, *supra* note 247, at 888 (discussing Wisconsin’s statute allowing pregnant women with severe drug and alcohol abuse problems to be taken into custody for the protection of their unborn child).

### A. *An Elegant, Simple Solution*

Without a doubt, the easiest way for lawmakers to provide increased legal protection for prenatal children is to revise the definition of “child” in current legislation to include prenatal children. In those jurisdictions where “child” has been defined as a minor under the age of eighteen,<sup>335</sup> all of the pertinent statutes could be rewritten to define child as “a human being from the moment of conception until the age of eighteen.” If “child” currently means a person after birth,<sup>336</sup> states could simply amend their existing definitions to expressly include prenatal children. Finally, states that have already defined life as beginning at conception for other legal purposes, such as homicide laws,<sup>337</sup> could adopt the same or similar language in their child abuse statutes.

### B. *Enforcement Mechanisms*

Another issue that must be addressed is the implementation of a clear and effective enforcement mechanism for any statute that

335. ALA. CODE § 26-14-1 (2012); ARIZ. R. JUV. P. 1(B) (2012); CAL. WELF. & INST. CODE § 101(b) (West 2012); COLO. REV. STAT. § 19-1-103(18) (West 2012); DEL. CODE ANN. tit. 29, § 9002A(4) (West 2012); FLA. STAT. ANN. § 39.01(12) (West 2012); GA. CODE ANN. § 15-11-2 (West 2011); IDAHO CODE ANN. § 16-1602(7) (West 2012); 705 ILL. COMP. STAT. 405/1-3(10) (West 2011); IND. CODE ANN. § 31-9-2-13 (West 2012); KAN. STAT. ANN. § 38-2202(d) (West 2012); KY. REV. STAT. ANN. § 600.020(8) (West 2012); ME. REV. STAT. tit. 22, § 4002(2) (2011); MICH. COMP. LAWS ANN. § 722.622(e) (West 2011); MINN. STAT. ANN. § 260C.007(4) (West 2012); MO. ANN. STAT. § 210.110(4) (West 2012); NEB. REV. STAT. ANN. § 43-245(7) (2011); NEV. REV. STAT. ANN. § 128.0124 (West 2011); N.H. REV. STAT. ANN. § 169-C:3 (2012); N.J. STAT. ANN. § 30:4C-2(b) (West 2012); N.C. GEN. STAT. ANN. § 7B-101(14) (West 2012); OHIO REV. CODE ANN. § 2151.011(B)(5) (West 2011); OKLA. STAT. ANN. tit. 10A, § 1-1-105(7) (West 2011); OR. REV. STAT. ANN. § 418.001 (West 2009); 23 PA. CONS. STAT. ANN. § 2732 (West 2012); R.I. GEN. LAWS § 40-11-2(2) (West 2012); S.C. CODE ANN. § 63-7-20(3) (2012); TENN. CODE ANN. § 37-1-102(4)(A) (West 2012); TEX. FAM. CODE ANN. § 101.003 (West 2012); UTAH CODE ANN. § 78A-6-105(6) (West 2012); VA. CODE ANN. § 16.1-228 (West 2012); WASH. REV. CODE ANN. § 26.44.020(2) (West 2012); W. VA. CODE ANN. § 49-1-2 (West 2012); WYO. STAT. ANN. § 14-3-202 (West 2012).

336. ARK. CODE ANN. § 9-27-303(32) (West 2012); HAW. REV. STAT. § 587A-4 (West 2012).

337. ALA. CODE § 13A-6-1(3) (2012); ARK. CONST. amend. 68, § 2 (2012) (providing protection for unborn children from the moment of conception); ARK. CONST. amend. 68, § 2 (2011) (providing that an unborn child is a human being from conception); 720 ILL. COMP. STAT. ANN. 510/10 (West 2011) (providing that an unborn child is a human being from the moment of conception); KAN. STAT. ANN. § 21-5419 (West 2012); KY. REV. STAT. ANN. § 507A.010–.060 (West 2012) (prohibiting the unlawful killing of an unborn child, which is defined as “a member of the species homo sapiens in utero from conception onward, without regard to age, health, or condition of dependency”); LA. REV. STAT. ANN. § 1299.35.0 (2012) (stating that an unborn child is a human being from the moment of conception); MISS. CODE ANN. § 97-3-37 (West 2012); MO. ANN. STAT. § 1.205 (West 2012); TENN. CODE ANN. § 39-13-214 (West 2012) (including viable prenatal children in the definition of crime victims).

seeks to protect prenatal children. As previously noted, South Dakota currently allows for pregnant women who abuse drugs or alcohol to be involuntarily committed for emergency treatment.<sup>338</sup> As an alternative to state custody, which is also permitted in Wisconsin, pregnant women are strongly encouraged to reside with an adult relative or friend for the duration of the pregnancy. In fact, lawmakers in Wisconsin specifically drafted their legislation to provide for an expectant mother's release on her own supervision after being counseled and warned about the potentially harmful consequences of her maternal conduct.<sup>339</sup>

However, in an abundance of caution, any statutes pertaining to maternal substance abuse should also expressly require the women to regularly attend counseling programs and medical appointments. Should they fail to do so, these expectant mothers could face the possibility of being involuntarily committed to an in-patient rehabilitation facility where they can be medically monitored around the clock and receive regular prenatal care. Moreover, in order to encourage pregnant women to seek drug or alcohol treatment on their own initiative before a court order becomes necessary, these patients should receive priority admission to substance abuse treatment programs sponsored by the government, as is mandated in Wisconsin.<sup>340</sup>

If a pregnant woman can be legally confined against her will whenever she abuses drugs or alcohol, then obviously certain procedural safeguards must remain in place to protect her constitutional rights. The existing child welfare legislation in Wisconsin already provides a model framework by affording pregnant women the right to have a hearing within forty-eight hours of being taken into custody, unless they specifically waive this judicial proceeding.<sup>341</sup> Moreover,

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338. S.D. CODIFIED LAWS § 34-20A-63 (2012) ("An intoxicated person who . . . [i]s pregnant and abusing alcohol or drugs; may be committed to an approved treatment facility for emergency treatment.").

339. WIS. STAT. ANN. § 48.203(1), (6)(b)8 (West 2011) ("Release or delivery of adult expectant mother from custody. (1) A person taking an adult expectant mother of an unborn child into custody shall make every effort to release the adult expectant mother to an adult relative or friend of the adult expectant mother after counseling or warning the adult expectant mother as may be appropriate or, if an adult relative or friend is unavailable, unwilling or unable to accept the release of the adult expectant mother, the person taking the adult expectant mother into custody may release the adult expectant mother under the adult expectant mother's own supervision after counseling or warning the adult expectant mother as may be appropriate. . . . The intake worker shall review the need to hold the adult expectant mother in custody and shall make every effort to release the adult expectant mother from custody[.]").

340. *Id.* § 51.46.

341. *Id.* §§ 48.213(1)(a), (2)(b) ("If an adult expectant mother of an unborn child who has been taken into custody is not released under s. 48.203, a hearing to determine whether the adult expectant mother shall continue to be held in custody under the criteria of

the expectant mother has the right to be represented by counsel, which she must be informed of prior to the hearing, as well as the right to examine and cross-examine witnesses.<sup>342</sup> If the judicial officer ultimately concludes that the woman is jeopardizing the life and health of her prenatal child, the Wisconsin statute expressly requires that one of following orders be entered:

Release the adult expectant mother and impose reasonable restrictions on the adult expectant mother's travel, association with other persons or places of abode during the period of the order, including a condition requiring the adult expectant mother to return to other custody as requested; or subject the adult expectant mother to the supervision of an agency agreeing to supervise the adult expectant mother.<sup>343</sup>

This legislation further provides that courts may impose “reasonable restrictions . . . upon the conduct of the adult expectant mother which may be necessary to ensure the safety of the unborn child and of the child when born.”<sup>344</sup>

Preventing women from seeking illegal abortions is a more manageable problem in that it involves the action of a state-licensed abortionist, a person far more susceptible to the effective application of coercive government authority. In these situations, a guardian *ad litem* could be legislatively authorized to file an emergency petition to enjoin the pregnant woman from seeking the abortion, as well as all of the abortionists licensed in the state from performing the procedure (with particular naming of any other abortionists specifically identified by the guardian *ad litem*), whether the abortion she seeks falls inside or outside of a particular jurisdiction. Rather than focusing on criminal prosecution of expectant mothers, courts can ensure

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s. 48.205(1m) shall be conducted by the judge or a circuit court commissioner within 48 hours after the time that the decision to hold the adult expectant mother was made, excluding Saturdays, Sundays and legal holidays. . . . The adult expectant mother may waive the hearing under this section. After any waiver, a hearing shall be granted at the request of any interested party.”).

342. *Id.* § 48.213(d)–(e) (“Prior to the commencement of the hearing, the adult expectant mother and the unborn child, through the unborn child’s guardian [*ad litem*], shall be informed by the court of the allegations that have been made or may be made, the nature and possible consequences of this hearing as compared to possible future hearings, the right to confront and cross-examine witnesses and the right to present witnesses. If the adult expectant mother is not represented by counsel at the hearing and the adult expectant mother is continued in custody as a result of the hearing, the adult expectant mother may request through counsel subsequently appointed or retained or through a guardian [*ad litem*] that the order to hold the adult expectant mother in custody be reheard.”).

343. *Id.* § 48.213(3)(a).

344. *Id.*



that doctors performing the illegal medical procedures are brought to justice and their clinics shut down, thereby resolving the problem at the root source.

### *C. Model Legislation*

The innovative child welfare legislation found in Wisconsin<sup>345</sup> can serve as a general template for a model statute. Areas of legislative consideration for modifying existing state statutes are identified below:

- Define “child” to include all living prenatal children.
- Expressly provide for the appointment of guardians *ad litem* for prenatal children in all cases involving substantiated allegations of maternal substance abuse or threatened illegal abortion, and further mandate that the services provided by these advocates shall continue after the birth of the child until specifically terminated by a judicial officer.
- Amend child welfare laws to identify maternal substance abuse endangering the health of prenatal children, as well as threatened illegal abortion, as circumstances giving rise to judicial intervention.
- Empower state courts to utilize more effective methods to address maternal substance abuse until the child is born (including taking the expectant mother into custody for emergency treatment), and to enjoin threatened illegal abortion.
- Amend state medical licensing laws to require the relevant government agencies to maintain a current record of injunctions against illegal abortion, and to require persons licensed to perform abortions to review the list prior to performing any abortion.
- Provide for permanent loss of medical license for the violation of an anti-abortion injunction; said loss to be judged by standards of strict liability under which the actor acts at his peril and no excuse of ignorance will be entertained.
- Amend state homicide laws to include illegal abortion after injunction in the category of murder offenses.

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345. WIS. STAT. ANN. § 48.133 (West 2011) *et seq.*

- Discourage spurious legal challenges by including such language as: “Nothing in this section shall be construed in such a manner as to violate the rights of any individual under the Constitution of the United States, or under the Constitution of this State.”<sup>346</sup>

### CONCLUSION

Guardian *ad litem* representation is so valued globally that every state in this nation and many countries throughout the world provide these appointed advocates for children in a wide variety of legal situations. Prenatal children are the only children in our society who seldom receive any legal representation whatsoever even when they are gravely abused or neglected by their own mothers. The time has come to permit these child advocates to also protect the welfare of unborn children.

This article has examined the case for appointing guardians *ad litem* for prenatal children in all cases involving substantiated allegations of maternal substance abuse or whenever a concerned person discovers that a pregnant woman intends to obtain an illegal abortion. Irrefutable medical research has confirmed that prenatal abuse and neglect has profound consequences for a child long after he or she is born. Hence, when the life and health of an unborn child is endangered by the expectant mother’s own irresponsible decisions, it is incumbent upon the government to come to the aid of these children just as the government aids and protects children after they are born.

There is nothing in Supreme Court jurisprudence to prevent legal representation for prenatal children who are physically suffering at the hands of their own mothers. *Roe v. Wade* and its progeny of abortion cases is entirely irrelevant to guardian *ad litem* representation in child protective proceedings. A pregnant woman cannot be isolated in her privacy; rather, her personal privacy interests must be measured against the State’s important and legitimate interest in protecting the life of her prenatal child.

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346. The “right” to abortion is not cast in stone from Mount Sinai, and may go the way of other purported rights, such as the right to own another human being as property. Rather than carve out an exception for “a woman’s right to an abortion,” the model here follows the drafting choice reflected in the Federal Rules of Evidence in dealing with rape shield laws. Rule 412, for example, excludes evidence of a sex crime victim’s past sexual activity or sexual predisposition, but provides that the exclusion does not extend to “evidence whose exclusion would violate the defendant’s constitutional rights.” FED. R. EVID. 412(b)(1)(C). From a legal perspective, putting such exclusion in the evidence law is as unnecessary as is including it in a guardian *ad litem* law: the Constitution would apply whether or not the rule said so. Its utility lies in facilitating judicial review and making legislative intent overtly, rather than implicitly, conform to whatever the Constitution is currently found to require.

This article has also cited to numerous instances in which state legislatures and courts have recognized the legal status of prenatal children for purposes of inheritance, insurance policies, negligence actions, wrongful death, and homicide. Since this vast existing legal precedent already functions to benefit children before they are born, courts should recognize a prenatal baby as a “child” for purposes of child protective proceedings. If states can provide legal remedies for prenatal children who are injured or endangered in utero, either by third parties or their own mothers, then the government should also provide increased legal protection for these children in order to prevent this irreparable harm in the first place. Likewise, if courts can compel a pregnant woman to undergo a medical procedure performed on her body for the benefit of her unborn child, then the government should also intervene when that same woman is inflicting preventable harm on her child by abusing drugs or alcohol during the pregnancy.

In conclusion, since *all* children have a legal right to begin life with a sound mind and body, the State has an unquestionable duty to intervene whenever a defenseless child needs protection, or wherever existing legal limits on abortion are being ignored or flouted, as in the long overdue pending criminal charges against Dr. Kermit Gosnell. As a natural extension of *parens patriae* philosophy, guardian *ad litem* representation is an essential judicial tool that can be readily utilized to bridge the current gap in child welfare legislation by giving a voice and a champion to the most vulnerable among us.